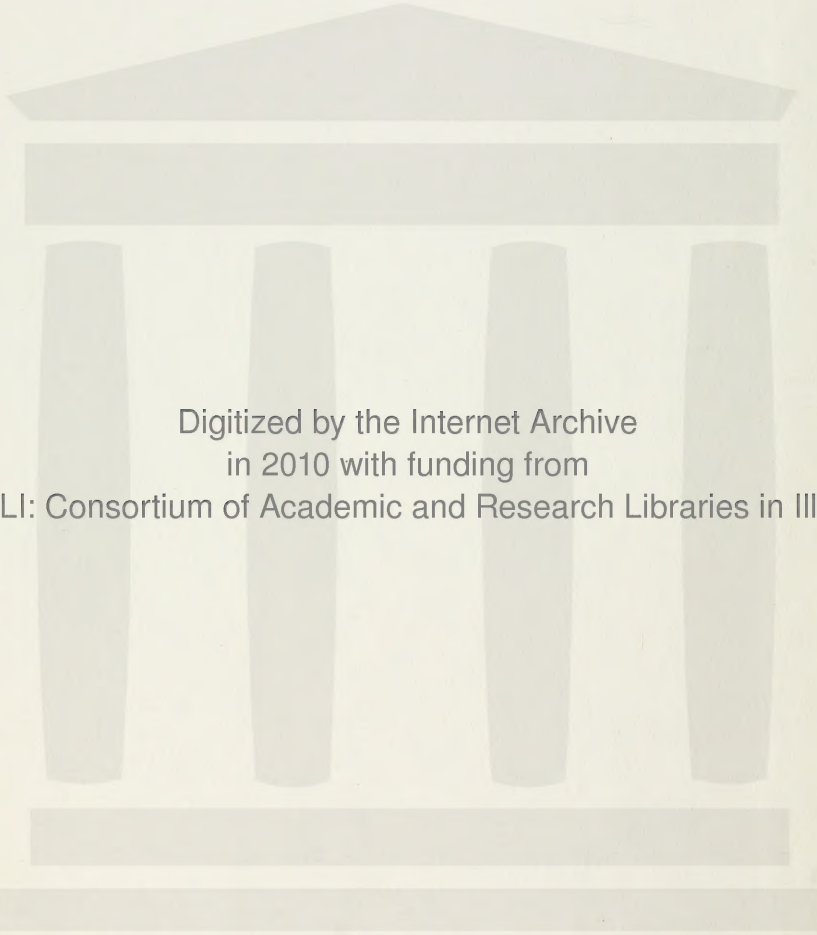

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CHICAGO BAR
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ASSOCIATION

JAN 16 1960
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1 - 29966

CHARLES P. R. MACAULAY,
Plaintiff in Error,

vs.

MARY KELLY,
Defendant in Error.

243 I.A. 597

ERROR TO THE CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks the reversal of an adverse judgment entered upon the verdict of a jury. Judgment was originally entered against defendant by confession under a power of attorney in a note executed by defendant and delivered to plaintiff. Upon motion the defendant was allowed to plead and defend.

She pleaded failure of consideration in that she had employed plaintiff and Charles E. Erbstein to act as her solicitors in a certain cause then pending in the Superior court of Cook county, and executed and delivered the note in question to them upon the sole and only consideration that they should so represent her; but that wholly disregarding and in violation of the agreement to so defend said cause, they failed, refused and neglected to appear and negligently permitted a decree in said cause to be entered against her pro confesso; that through such negligence she suffered great loss and was compelled to and did at great expense employ other counsel to obtain a reversal of said decree. Upon trial of the issue of fact as presented, the verdict was for the defendant and judgment was accordingly entered.

This note was secured by a trust deed, and subsequently Mary Kelly filed her bill against Charles P. R. Macaulay, Charles Erbstein, and the trustee, seeking to have the lien of the trust

JAN 16 1950

2431 I.A. 597

CHARLES F. H. MACLEAY,

Plaintiff in Error,

vs.

MARY KELLY,

Defendant in Error.

ERROR TO THE CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE JAMES HAMILTON MCKENNEY

DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks the reversal of an adverse judgment entered upon the verdict of a jury. Judgment was originally entered against defendant by confession under a warrant of attorney in a note executed by defendant and delivered to plaintiff. Upon motion the defendant was allowed to plead and defend.

The plaintiff's failure of consideration in that she had employed plaintiff and Charles F. Kirkpatrick to act as her solicitors in a certain cause then pending in the Superior Court of Cook County, and executed and delivered the note in question to them upon the sole and only consideration that they should so represent her; but that wholly disregarding and in violation of the agreement to so defend said cause, they failed, refused and neglected to appear and negligently permitted a decree in said cause to be entered against her for [illegible]: that through such negligence the mortgaged premises had been advertised to and did at great expense employ other counsel to obtain a removal of said decree. Upon trial of the issue of fact as presented, the verdict was for the defendant and judgment was accordingly entered. This note was secured by a trust deed, and subsequently Mary Kelly filed her bill against Charles F. H. Macleay, Charles Kirkpatrick, and the trustee, asking to have the lien of the trust

deed removed as a cloud and ordering that a release of the same be executed. She obtained a decree in accordance with the prayer of her bill, which was affirmed by this court in case No. 30677, opinion filed March 2, 1926. A petition for certiorari to the Supreme Court was subsequently denied. The basis of the conclusion in that case was that the note had been extinguished by the judgment at law. By the instant writ of error, sued out on the last day of the two year period of limitation, the reversal of this judgment is sought.

The brief filed on behalf of plaintiff does not follow our rules, but apparently the only point argued is that the court should have peremptorily instructed the jury to find for the plaintiff. We do not find any reasonable theory on which this should have been done. The defendant introduced evidence tending to support her plea of a total failure of consideration. This presented a question of fact for the jury to determine, and the record does not show that the verdict was manifestly against the weight of the evidence. Under such circumstances the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

65 - 30881

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOHN KUYAKEWICH,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

243 I.A. 597

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant, John Kuyakewich, with Edward Rakowski and Mike Peculies, by indictment was charged with stealing and taking away on October 13, 1925, two cases of eggs valued at $12.75, the property of Richard J. Coyne. Defendant was granted a separate trial. A jury found him guilty and he was sentenced to one year's imprisonment in the House of Correction and to pay a fine of $10.

The jury could properly believe that defendant had a meat market and grocery at the corner of 14th place and Sangamon street, Chicago; that prior to October 13, 1925, Edward Rakowski and Mike Peculies, two young boys, were at defendant's place of business, where defendant asked them if they wanted to earn some money, and told them in substance if they would pick up merchandise in and around the South Water street market and bring the same to him he would pay them for it; that on October 13, 1925, the two boys were seen by a private detective going down the alley in the rear of Coyne Bros.' store, which one of them entered and from which he brought out a case of eggs which he gave to the other boy. The detective arrested one of the boys, but the other escaped and went to the defendant's store, where he was afterwards arrested. Defendant himself disappeared from his store at the time and did not return for two or three days.

It is first argued for reversal that the evidence failed to establish that Richard J. Coyne was the owner of the eggs

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

vs.

JOHN HOLZAMMER,
Plaintiff in Error.

2431 A. 597

MR. JUSTICE JUSTICE DELVENTHAL

DELIVERED THE OPINION OF THE COURT.

Defendant, John Holzammer, with Edward Radowski and Mike Pesullen, by indictment was charged with stealing and taking away on October 13, 1928, two dozen of eggs valued at $12.00, the property of Richard G. Coyne. Defendants was granted a separate trial. A jury found him guilty and he was sentenced to one year's imprisonment in the House of Correction and to pay a fine of $50.

The jury could warrantly believe that defendant had a meat market and grocery at the corner of 51st place and Seeley street, Chicago; that prior to October 13, 1928, Edward Radowski and Mike Pesullen, two young boys, were at defendant's place of business, where defendant would time it they wanted to earn some money, and told them in substance if they would pick up watermelons in and around the South Water street market and bring the same to him he would pay them for it; that on October 13, 1928, the two boys were seen by a private detective going down the alley in the rear of Coyne Bros.' store, which was one of three adjoining and fronting on 51st place. The detective arrested one of the boys, but the other escaped and went to the defendant's store, where he was afterwards arrested. The latter himself disappeared from his store on the time and did not return for two or three days.

It is first argued for reversal that the evidence failed to establish that Richard G. Coyne was the owner of the eggs

alleged to have been stolen. Coyne testified that he had a place of business in South Water street market from August 31, 1925, to the date of the trial, November 18, 1925, where he did business under the trade name of Coyne Bros., and that he was the sole owner of the business. He gave a description of his store and his stock of goods, including eggs. The detective saw the two boys steal a case of eggs from Coyne Bros.' store. The manager of Coyne Bros.' egg department identified the case of eggs which was stolen. The witnesses, Rakowski and Peculies, testified that they took the case of eggs from Coyne Bros.' store. This evidence, with other circumstances in the case, sufficiently proved the ownership.

It is next said that there was error in the admission of evidence relating to other crimes which had no connection with the crime alleged in the indictment. Peculies testified that some time prior to October 13th he and Rakowski had a conversation with the defendant, who said, "If we get anything, we should sell it to him, and he told us the Market is a good place to get things; told us to get anything we can get hold of; said he would buy it off of us;" that subsequently he and Rakowski committed another theft and sold the proceeds to defendant, and that on the morning of October 13th, the date of the crime alleged, they were again told by defendant to see if they could get something more at the Market. The evidence of another theft was admitted only to show the relationship of the parties and that the theft in question was in pursuance of an agreement with the defendant. This would make the defendant equally guilty with the persons who actually took the property, although the defendant may not have been present at the time. There was no error in receiving this evidence. People v. Walinsky, 300 Ill. 92; People v. Bond, 291 Ill. 74.

It is next said that the conduct of the prosecuting attorney was improper, requiring a reversal. The cases cited by defendant's attorney are in general cases where the prosecuting attorney improperly questioned witnesses on behalf of the defendant. Here, the alleged improper questions were put to the State's witnesses and tended to show that they were delinquents. This rathe tended to weaken their testimony, so we cannot say that the defendant was injured by developing this fact.

Errors are alleged with reference to the instructions, which are not in the brief and are referred to only by number. Instruction described as No. 5, given on behalf of the People, is merely a restatement of the statute defining an accessory. It was not error to refuse instruction No. 3 offered by the defendant, as the last paragraph is unintelligible. What the instruction was intended to cover was, however, in instruction No. 6, given at defendant's request. There was no error with reference to the instructions.

It is said that the verdict cannot stand because the defendant was found guilty of larceny, whereas the indictment charged that the defendant feloniously and burglariously committed the theft. Burglary and larceny may be charged in the same count of an indictment. People v. Goodwin, 263 Ill. 99; People v. Fitzgerald, 297 Ill. 264. It is not necessary that the words "feloniously " and "burglariously" be used; they may be rejected as surplusage and the count as to larceny still be good. People v. Connors, 301 Ill. 112.

The uncorroborated testimony of an accomplice is sufficient to support a verdict of guilty. Juretich v. People, 223 Ill. 484. The jury saw the two accomplices of defendant while on the witness stand and observed their demeanor and conduct while

testifying. They also had the benefit of observing the defendant, who testified. We cannot say that the jury was not justified in believing the testimony of the accomplices, corroborated as it was by several circumstances.

As there was no reversible error on the trial, the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

100 - 30917

WADE TWICHELL COMPANY,
a Corporation,
Appellee,

vs.

JAMES L. GAUDRIE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 597

MR. PRESIDING JUSTICE McBURELY
DELIVERED THE OPINION OF THE COURT.

Judgment for $2281.75 was entered by confession against defendant by virtue of a power of attorney in his note. Subsequently he filed a petition asking that he be given leave to appear and make defense, which was allowed, the judgment to stand as security. The case was called for trial before a jury and after hearing the evidence the court instructed to find the issue for the plaintiff. From the judgment on the verdict the defendant appeals.

The note was given in payment of a piano bought by defendant from the plaintiff. Defendant says he refused to pay the note on the ground that the piano was not the kind of paino called for by his written contract with plaintiff. The controversy centers about the language of this contract describing the kind of piano sold to the defendant. Although the contract was read in evidence it does not appear in the abstract. We are therefore unable to construe it or arrive at any opinion about it.

It is well settled that the abstract must show matters relied on for reversal, and that the reviewing court will not examine the record to find grounds for reversal. Deterding v. Central Illinois Public Service Co., 223 Ill. App. 374.

Although not required to do so, we have searched the bill of exceptions for this contract and do not find it there. It is therefore not properly before this court.

JAMES I. GILBERT,

Appellant.

vs.

A Corporation,

Appellee.

STATE TRUCKING CONTRACT.

Action upon Contract

of Carriage.

No. MUNICIPAL JUSTICE REQUIRED

Instrument not original of the court.

Judgment for $2591.75 was entered by confession against defendant by virtue of a power of attorney in his note. Subsequently he filed a petition asking that he be given leave to appear and make defense, which was allowed, the judgment to stand as security. The case was called for trial before a jury and after hearing the evidence the court instructed to find the issue for the plaintiff. From the judgment on the verdict the defendant appeals.

The note was given in payment of a piano bought by defendant from the plaintiff. Defendant says he refused to pay the note on the ground that the piano was not the kind of piano called for by his written contract with plaintiff. The conservatory contract about the language of this contract describing the kind of piano sold to the defendant. Although the contract was read in evidence it does not appear in the abstract. We are therefore unable to construe it or arrive at any opinion about it.

It is well settled that the abstract must show matters relied on for reversal, and that the reviewing court will not examine the record to find grounds for reversal. Switzerling v. Central Illinois Public Service Co., 288 Ill. App. 394.

Although not required in it, we have searched the *full* of exceptions for this document and do not find it there. It is therefore not properly before this court.

2431.A. 597

In the absence of the document embodying the agreement of the parties, which is the basis of this litigation, we must presume that the trial court correctly construed it and rightly concluded that the piano delivered was in full compliance with its terms.

We might add that so far as the record shows the defendant still has the piano in question. He cannot retain the piano and at the same time escape paying for it. Wolf Co. v. Refrigerating Co., 252 Ill. 491; Brian v. Born Packers' Supply Co., 203 Ill. App. 262.

No good reason appearing for reversal, the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

115 - 30933

AGNES R. KRAMER,
Appellant,

vs.

KATHERINE B. SMITH,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

243 I.A. 597

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an adverse judgment entered on a verdict for the defendant directed by the court. The defendant does not appear in this court.

The action was to recover damages for personal injuries. Defendant was in possession of a three story flat building in Chicago and leased the third floor flat to the plaintiff. There was a flat on each floor, and in the rear of each was a wooden porch twelve feet wide with connecting stairways which led to the ground in the rear of the building. The porches were for the use of the tenants and occupants of the flats and any other persons who might lawfully be upon the premises for the purpose of ingress and egress to and from the flats. The porches were supported by four wooden supports. Plaintiff had been a tenant of the third floor apartment since October 1, 1921. On June 10, 1922, she stepped out on the rear porch for some domestic purpose and while standing there the entire porch structure collapsed and fell to the ground, injuring plaintiff.

It was averred in the declaration that the collapse of the porch was caused by the defective condition of the wooden supports extending from the first and second floor porches to the third floor porch, and on the trial the plaintiff sought to show the condition of these supports, but the court refused to admit any

ASPHALT MINE DISTRICT COURT

OF COOK COUNTY.

2431 I.A. 597

evidence as to their condition. The court was apparently of the opinion that the plaintiff could not recover unless she could prove that she had a contract binding on the landlord to keep these stairways and rear porches in repair.

The trial court was in error in so ruling. Evidence should have been admitted, tending to show the condition of the rear porches, supports and stairways. The landlord, who rents different parts of his building to various tenants but reserves the stairways and other approaches or other parts of the building for the common use of his tenants, is under an implied duty to keep them in a reasonably safe condition and is liable for damages to persons lawfully in the building, resulting from a failure to perform that duty. Shoninger Co. v. Mann, 219 Ill. 242; Burke v. Hulett, 216 Ill. 545; Fowler v. Crilly, 187 Ill. App. 403.

Peremptory instruction for the defendant should not have been given if the evidence tended to prove the allegations of the declaration and there was any evidence, with all its reasonable inferences and intendments, fairly tending to show the plaintiff's right to recover. Libby, McNeill & Libby v. Cook, 222 Ill.206.

The evidence tended to show that the first and second story porches with their supports and stairways were for the common use of the tenants, and under the rule the landlord was under an implied duty to use reasonable care to keep them in a reasonably safe condition. The case should have gone to the jury.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

evidence as to their condition. The court was apparently of the opinion that the plaintiff could not recover unless she could prove that she had a contract binding on the landlord to keep these stairways and rear porches in repair.

The trial court was in error in so ruling. Ordinance should have been admitted, tending to show the condition of the rear porches, entrances and stairways. The landlord, who rents different parts of his building to various tenants (at tenants the stairways and other entrances at their ends of the building) is a reasonably safe condition and is liable for damages if injured the common use of all tenants, it might be held liable to each tenant. Lawlessness in the building, resulting from a failure to maintain the duty. Shelton v. Sec., (Ky. App.) 177 S.W. 1117; Ewald v. Realty, 158 S.W. 1117. Any, 877.

The evidence tending to show that the stairway and rear porches were in such condition that they were dangerous to use should have been given at the request of the plaintiff. Under the rule the jury's province to decide. Miller v. Smith, 1 Litt. 343; Ewald v. Realty, 158 S.W. 1117. Any, 877.

The judgment is reversed and the cause remanded.

127 - 30946

DORRANCE, SULLIVAN & CO., a Corporation,
Appellant,

vs.

ROY QUINLAN,
Appellee.

243 I.A. 598

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on eleven notes for $500 each, executed and delivered by defendant. Defendant pleaded no consideration for the notes. Upon trial the jury returned a verdict against the plaintiff, and from the judgment of nil capiat it appeals.

Plaintiff argues at length as to the sufficiency of the evidence to sustain the verdict, but defendant replies that this cannot be questioned in this court for the reason that there is no motion for a new trial in the bill of exceptions. The bill of exceptions does not show a motion for a new trial, and it is the well established practice that under such circumstances there is not presented to the reviewing court any question as to whether the verdict is against the evidence. Yarber v. Chicago & Alton Ry. Co., 235 Ill. 589; Greenwell v. Hess, 298 Ill. 459; People v. Faulkner, 248 Ill., 158; Anderson v. Karstens, 297 Ill. 76; Briggs v. Page, 222 Ill. App. 223.

We must therefore presume as sufficiently proven that defendant was employed by plaintiff as an advertising solicitor at a salary of $150 a week and a commission of 4 per cent. on his billings above a certain amount; that plaintiff sent checks to

2431.A. 598

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

defendant endorsed "drawing account to apply against commissions earned;" that it subsequently developed that plaintiff had advanced to defendant more than the amount of commissions upon business produced by defendant, and thereupon, at the solicitation of plaintiff, defendant signed the notes in question, which represented the amount of the excess of advances over commissions.

An employee is not personally liable for money advanced to him in excess of commissions where advanced as a drawing account to be charged against commissions. Felsenthal Bros. & Co. vs. Gradwohl, 217 Ill. App. 170; Hall vs. Bird-Bergstrom Motor Car Co., 227 Ill. App. 587; 39 C. J. 153. By the contract of employment the parties did not intend that the money advanced to defendant from time to time should be repaid to plaintiff in the event defendant's commissions did not equal the advances. This being the rule, the defense of no consideration for the notes was proven.

Complaint is made of the rulings of the court upon the admissibility of evidence, but we find no prejudicial error in this respect. Defendant under his plea was entitled to show the entire transaction between the parties touching this issue.

The judgment is proper and is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

136 - 30955

ANDREW T. STOKES and VERA POOLE,
Appellees,

vs.

JOHN B. MORRIS and BURNETT MORRIS, his wife,
Appellants.

243 I.A. 598

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

Apparently this is an appeal by defendants from a judgment against them for $100, entered upon the findings of the court. The judgment might well be affirmed on the ground that the abstract of record is not an abstract but merely an index, giving us no information as to the nature of the claim.

However, examination of the record shows that it is a suit brought for the return of earnest money paid on a contract of sale, whereby defendants agreed to sell and deliver to plaintiffs all their interest and title to a certain contract for a warranty deed, conveying real estate, that defendants had with a Mr. George Allen. The contract is conditioned upon the cancellation of a certain outstanding contract with Walter H. Smith and wife, and notice of such cancellation was to be given by the defendants to plaintiffs within ten days after such cancellation. It is claimed that this cancellation was by virtue of a letter to Smith, but there is no evidence that it was ever mailed to Smith or his wife, or that it was ever received by either of them.

The letter itself is somewhat vague, referring to an opinion of title that the defendants had received from the Chicago Title & Trust Company, and stating that, as neither Smith nor his wife had taken any steps to consummate the sale, the defendants

2 1913 A. 598

declared their contract forfeited. This opinion of the Chicago Title & Trust Company shows a number of very important objections to the title which, ordinarily, it would be incumbent upon the sellers to remove. It would be unreasonable to assume that a proposed purchaser should clear up such objections. The sellers, the defendants, would have no right to cancel their contract with Smith and his wife because of their own failure to clear up the title.

There are other irregularities in the evidence offered on behalf of the defendants; for instance, the alleged letter directed to Smith and wife purporting to cancel the contract is dated April 15, 1925, and yet it bases the reasons for cancelling the contract upon the opinion of the Chicago Title & Trust Company, which is dated May 8, 1925. There are other discrepancies in the defendants' evidence; so, taking the record as a whole, the judgment was justified and it is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

(

143 - 30967

JOHN RUSSELL,
Appellee,

vs.

JACOB SHAFTON and LEO SHAFTON, Doing Business as SHAFTON COMPANY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

243 I.A. 598

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover the balance due on the contract price of a car of peaches sold and delivered to defendants. Defendants pleaded that they had paid to plaintiff a sum less than the contract price, which was accepted by him in full satisfaction of his claim. The trial court found against the defendants and gave plaintiff judgment for the balance due of $454.64, and from this judgment defendants appeal.

Plaintiff resides in Sanford, Florida, and defendants in Chicago. The evidence tends to show that in August, 1919, plaintiff verbally agreed to ship ten carloads of peaches to defendants. The cars were shipped at intervals and the plaintiff would make drafts upon the defendants for the purchase price, which were paid on nine of the cars. In September defendants wired a complaint as to the size of the peaches, to which plaintiff replied, requesting the numbers of cars received so they could be checked, and asked for a quick answer. Defendants did not comply with this request. When the draft for the tenth and last car was sent it was returned unpaid, and on December 2nd defendants wrote to plaintiff as follows:

"Chicago, Dec. 2, 1919.

Mr. John Russell,
Sanford, Fla.
Dear Sir:

Referring to the Peach Deal, we had to make the following allowances:

Dear Friend,

As

Sincerely,

Dear Sir:

Referring to the Bench Book, we look to make the [illegible]

Yours very truly,

Dear Sir:

"Chicago," June 3, 1939.

In Plaintiff vs Defendant

[illegible] when the Bench for the Bench and [illegible] with this request. When the Bench for the Bench and [illegible] sheet it was returned empty, and we therefore [illegible] charged, and asked for a quick answer. Defendants did not comply [illegible] requesting the members of Bars received so they could be [illegible] a complaint as to the time of the pendency, by which plaintiff [illegible] were paid no part of the sum. In Chancery defendants would make Briefs upon the defendants the purchase price, [illegible] Complaint. The sums were assigned of Indictments and the plaintiff [illegible] explicitly agreed to sell the accounts of Executors be Indictments in Chicago. The matters remain to sign for lawyer, Jury, [illegible] 8154.04, and from this Judgment Attorneys Bedford.

Plaintiff's Attorneys in Bedford, Florida, and Defendants [illegible] and Case Plaintiff, Judgment for the Defendant Due of [illegible] relationship of his estate. In still court Judge Against the [illegible] and case plaintiff, Judgment for the Defendant Due of [illegible] Complaint. Defendants Plaintiff Court Judge Bedford & [illegible] Case Time the Attorney Brief, which can commence by time be [illegible] Complaint. The still court Judge Against the [illegible] and case plaintiff, Judgment for the Defendant Due of [illegible] Complaint. Defendants Plaintiff Court Judge Bedford & [illegible] Case Time the Attorney Brief, which can commence by time be [illegible] Complaint. The still court Judge Against the [illegible] and case plaintiff, Judgment for the Defendant Due of [illegible] Complaint. Defendants Plaintiff Court Judge Bedford & [illegible] Case Time the Attorney Brief, which can commence by time be [illegible]

Plaintiff commence suit to recover the Defendant Due on the Contract price of a car of Jewelry on [illegible] suit was Delivered by the Complaint. Defendants Plaintiff Court Judge Bedford & [illegible] Case Time the Attorney Brief, which can commence by time be [illegible]

Plaintiff commence suit to recover the Defendant Due on the Contract price of a car of Jewelry on [illegible] suit was Delivered by the Complaint. Defendants Plaintiff Court Judge Bedford & [illegible] Case Time the Attorney Brief, which can commence by time be [illegible]

Plaintiff commence suit to recover the Defendant Due on the Contract price of a car of Jewelry on [illegible] suit was Delivered by the Complaint. Defendants Plaintiff Court Judge Bedford & [illegible] Case Time the Attorney Brief, which can commence by time be [illegible]

Plaintiff commence suit to recover the Defendant Due on the Contract price of a car of Jewelry on [illegible] suit was Delivered by the Complaint. Defendants Plaintiff Court Judge Bedford & [illegible] Case Time the Attorney Brief, which can commence by time be [illegible]

Plaintiff commence suit to recover the Defendant Due on the Contract price of a car of Jewelry on [illegible] suit was Delivered by the Complaint. Defendants Plaintiff Court Judge Bedford & [illegible] Case Time the Attorney Brief, which can commence by time be [illegible]

H. J. Lewis, Kalamazoo, Mich.	$150.00
Bredehoft & Ball, Danville, Ill.	67.05
H. Heilprin, Madison, Wis.	68.25
Lost on car sold thru store	169.34
Total,	$454.64

We are deducting these allowances, and enclose you check to balance.

It is true you wired us that if not satisfactory you would divert them elsewhere, but we had taken orders and sold cars to different points and we did not know there was anything wrong until cars got there. Some of the later cars were better and up to grade, so there was no necessity of diversion. The reason we did not send you a statement and check to balance before this was because you was travelling and we did not know where we could reach you, and the Madison, Wis., car was not adjusted until just recently. Party was claiming considerable more allowance.

Trusting that this explanation is satisfactory, we are,

Yours very truly,
The Shafton Company."

Enclosed was a check for $371.56. To this plaintiff replied as follows:

"Sanford, Florida, Dec. 13, 1919.

The Shafton Co.,
Chicago, Ill.
Gentlemen:

We have your favor of Dec. 2d enclosing check for $371.56, for which we give you credit on account, but we positively will not make you allowances on stuff that you have shipped around to different markets and had trouble with, as we did not guarantee you a profit, nor did we guarantee that you could make delivery to every Tom, Dick and Harry on goods that we shipped you to Chicago. This is entirely out of reason and we are not going to stand for it. We do not want to have trouble over this affair, but you are certainly going to pay us the balance of this account in full. If you do not pay it without trouble you will pay it with, I'll tell you that right now, because you did not refuse any of the cars, and I gave you an opportunity to let us divert the cars if you saw fit, you did not see fit, and that was your acceptance in every particular, and I will certainly not entertain this as a full settlement. Now don't pass this idly by, because if you do we are going to start something.

Yours truly,
(Signed) John Russell."

The check enclosed in defendants' letter was retained by plaintiff and cashed December 18, 1919. Defendants' account was credited with this, and suit followed for the balance.

Whether or not the acceptance of a less sum than is actually due amounts to an accord and satisfaction depends upon

the peculiar circumstances in each case. There must be a bona fide dispute between the parties, and merely an attempt to extinguish an obligation by the payment of a sum less than the whole amount due is not an accord and satisfaction.

In the instant case there was no dispute between the parties as to the tenth car of peaches, and any complaint as to the prior cars had not been pressed and they were paid for. Furthermore, the check was not tendered with any statement that, if accepted, it would be considered payment in full. Nothing in the letter can be so construed.

It is the well established rule that to constitute an accord and satisfaction there must be an honest dispute between the parties as to the account, and a tender made with explicit understanding of both parties that it is in full payment of all demands and an acceptance by the creditor with the understanding that the tender is accepted in full payment. Farmers & Mechanics Life Assn. v. Caine, 224 Ill. 606; Snow v. Greisheimer, 220 Ill. 109; Hayes v. Mass. Life Ins. Co., 125 Ill. 638; Steidtmann v. Jos. Lay Co., 234 Ill. 84; Olson v. Wabash Coal Co., 126 Ill. App. 253; Am. F. & M. Co. v. Lindsay Chair Co., 129 Ill. App. 548; Keiper v. Am. C. & E. Co., 187 Ill. App. 131; Teague v. Burns, 187 Ill. App. 225; Obermeyer v. Wis. Dairy Farms Co., 199 Ill. App. 568.

The trial court properly held that the evidence did not establish accord and satisfaction and as there was no dispute as to the amount claimed by plaintiff, judgment properly followed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

157 - 30976

LAKE VIEW TRUST & SAVINGS BANK, a Corporation,
Appellant,

vs.

EDWARD T. KELLY COMPANY, a Corporation,
Appellee.

243 I.A. 598
APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks the reversal of an adverse judgment rendered in a suit brought to recover $75 alleged to have been paid by plaintiff to defendant under a mistake of fact.

Plaintiff is a banking corporation, and on January 15, 1925, it was served with a garnishee summons in the case of Martin H. Schaefer for the use of Edward T. Kelly Company, Municipal court, then and there to answer as to the rights, credits, choses in action or money in its hands belonging to said Martin H. Schaefer. Plaintiff filed an answer, admitting that it had in its possession belonging to Martin H. Schaefer the sum of $75; judgment was rendered on the answer, plaintiff paid said sum to the Edward T. Kelly Company, and the judgment was satisfied of record.

Subsequently, as a witness on behalf of plaintiff testified, "It developed later that he (Martin H. Schaefer) was not the judgment debtor," and plaintiff reimbursed the Mr. Schaefer with whom it had an account. It then demanded the return of the money paid to the Kelly Company, which was refused, and this action followed.

We agree with the argument of counsel for defendant that this is not a suit to recover money paid under a mistake of

2431 A. 598

fact, but is a suit to recover money paid to satisfy a valid judgment rendered by a court of competent jurisdiction. Plaintiff, before it filed its answer, should have investigated the matter by interviewing its depositor and ascertaining the facts. Then a proper defense could have been made. It was plaintiff's negligence in failing to present its defense in the garnishment suit which brought about the present unfortunate situation.

The judgment in the garnishment case is satisfied, and were the plaintiff to recover in the present action there would be no recourse for the Kelly Company. The parties would not be in statu quo. Plaintiff must stand the result of its own negligence.

The judgment is correct and is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

182 - 31001

JOHN LYNCH,
Appellee,

vs.

CHARLES I. NOLAN,
Appellant.

243 I.A. 598

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks a reversal of a judgment against him for $508.45 in an action to recover money loaned by plaintiff to him.

The record shows that on May 8, 1924, defendant filed his appearance, made a jury demand, and was ordered to file an affidavit of merits in ten days. In the meantime the case was placed on the jury calendar. A number of affidavits of merits and claims of set-off were filed and stricken. All of the affidavits of merits admitted the claim of plaintiff, but claimed a set-off for work and labor performed by defendant for the plaintiff. On November 21, 1925, the court denied the plaintiff's motion to strike the defendant's affidavit and set-off then on file, but ordered the defendant to file a bill of particulars as to the claim of set-off within ten days. This bill of particulars was not filed and on December 2nd the cause was reached for trial and continued to the following day, when it was called. Plaintiff announced that he was ready, but counsel for defendant requested a continuance. This continuance was refused, and the case ordered to trial. The court was then advised that defendant had not filed a bill of particulars as ordered on November 21st, and on plaintiff's motion defendant's set-off was stricken because of failure to file the bill of particulars as ordered, and as the affidavit

of merits admitted plaintiff's claim, judgment against the defendant was entered.

The proceedings seem to be entirely proper. The bill of particulars was properly ordered because the claim of set-off alleged in general terms that defendant performed work and labor for plaintiff for a period covering two years and a half without showing the date or dates this work was done. Whether or not a litigant should be compelled to furnish a bill of particulars rests generally within the discretion of the court. DuBois v. People, 200 Ill. 157. On failure to furnish a bill of particulars as ordered, the court may strike out the pleading. American Rolling Mill Corporation v. Ohio Iron & Metal Co., 120 Ill. App. 614. After the set-off was stricken, defendant's affidavit of merits admitted plaintiff's claim and proof of the claim was not required, and judgment was properly entered. Epstein v. Fort Dearborn Motor Cartage Co., 207 Ill. App. 321.

Some complaint is made with reference to the "abbreviated" form in which Municipal court records are kept. However this may be, the judgment before us is written out in full and is in proper form.

The points made against the judgment are not substantial and it is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

202 - 31021

AMERICAN DISCOUNT COMPANY,
a Corporation,
Appellee,

vs.

W. E. HARRIS et al.,
Appellants.

243 I.A. 599
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an action in replevin, with a count in trover, tried by the court, in which plaintiff had a judgment for $387, from which defendant Harris appeals.

Harris bought an automobile from the Hugol Motor Company, giving as part of the purchase price his note dated August 9, 1924, for $1047, payable in monthly instalments of $60 each for eleven months and $387 in twelve months, secured by a chattel mortgage which was duly recorded. The note and mortgage were bought by plaintiff, the American Discount Company, for a consideration of $900, on August 11, 1924. Regularly every month for eleven months Harris paid the $60.00 instalments to plaintiff without making any complaint that there was a mistake in the amount of the note and mortgage. In July, 1925, when all of the payments had been made except the last payment of $387, which was due August 9, 1925, an employee of the plaintiff by mistake marked the note as paid and signed the cashier's name to a release of the mortgage and also signed a notary public's name to the acknowledgment and mailed these papers to Harris. Harris received the same, but made no move to correct the mistake. On August 9, 1925, a notice was mailed by plaintiff to Harris, requesting the payment of the $387, and in reply Harris wrote under date of August 13, 1925, stating that he had the note and the chattel mortgage and release in his

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APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

possession and that the release had been recorded, and invited the plaintiff to "wake up." Plaintiff's bookkeeper testified that when he received the letter he called Harris on the telephone and had a conversation with him, in which Harris for the first time claimed that the amount of the note and mortgage was wrong, in that when he signed the note and paper he did not have his glasses and could not read without them, and that he did not receive a credit for $425 for a car which he had delivered as part of the purchase price. Plaintiff's bookkeeper testified that on July 13, 1925, Harris came to plaintiff's office and asked to have the note of $387 extended, and that after conferring with the credit manager plaintiff declined to make this extension. Harris denies this conversation.

Plaintiff was proven to be a bona fide purchaser for value before maturity of the note without notice of any infirmity. Ehrlich v. Chapple, 311 Ill. 467. That the note and mortgage were cancelled and mailed to defendant by mistake is not controverted; hence such cancellation and mailing are inoperative.

The defense of fraud in the execution of the note was not proven, even if such defense were competent as against the plaintiff. There was no agreement that Harris was to receive a credit of $425 for his car. The price of the automobile, as appears from the chattel mortgage, was $1647, which was paid by the delivery of a secondhand car, plus $300 in cash, plus the note for $1047.

The trial court evidently believed that defendant wished to take advantage of the plaintiff's mistake in sending him the cancelled note and release of mortgage, and that the defense of fraud in securing his execution of the same was an afterthought. The judgment is correct and is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

possession and that the release had been revoked, and invited the plaintiff to "make up." Plaintiff's bookkeeper testified that [illegible] when he received the letter he called Harris on the telephone and had a conversation with him, in which Harris for the first time claimed that the amount of the note and mortgage was wrong, in that when he signed the note and paper he did not have his glasses and could not read without them, and that he did not receive a credit for $482 for a car which he had delivered as part of the purchase price. Plaintiff's bookkeeper testified that on July 1, 1928, Harris came to plaintiff's office and asked to have the note of $527 extended, and that after conferring with the credit manager plaintiff decided to make this extension. Harris denies this conversation.

Plaintiff was proven to be a bona fide purchaser for value before maturity of the note without notice of any infirmity, Turtle v. Chapple, 211 Ill. 447. That the note and mortgage were cancelled and mailed to defendant by mistake is not controverted; hence such cancellation and mailing are inoperative.

The defense of fraud in the execution of the note was not proven, even if such defense were competent as against the plaintiff. There was no agreement that Harris was to receive a credit of $482 for his car. The price of the automobile, as separate from the chattel mortgage, was $1647, which was paid by the delivery of a second-hand car, plus $300 in cash, plus the note for $1047.

The trial court evidently believed that defendant wished to take advantage of the plaintiff's mistake in sending him the cancelled note and release of mortgage, and that the defense of fraud in securing the execution of the same was an afterthought. The judgment is correct and is affirmed.

FINCH, P. J., concurs.

247 - 31067

ADAM SCHMALL,
Appellee,

vs.

THE BULL DOG AUTO FIRE INSURANCE ASSOCIATION OF CHICAGO,
Appellant.

243 I.A. 599

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for $400 entered upon the verdict of the jury in a trial of an action brought to recover on a policy of insurance issued by defendant to plaintiff.

The only defense presented is that the defendant was not liable, because its policy was a contract of indemnity against loss or damage and not a contract of indemnity against liability, and that plaintiff had not proven any actual loss or damage.

Plaintiff alleged and proved that while the policy was in full force and effect his automobile ran into and collided with one operated by Joseph Vogt; that thereafter Vogt commenced a suit in the Municipal court against him, which case proceeded to trial and a judgment in favor of Vogt and against plaintiff was had for $400; that said judgment remained in full force and effect and no appeal had been taken therefrom; and that under the policy sued on, defendant was bound to pay this judgment.

The distinction between a contract of indemnity against loss and a contract of indemnity against liability is recognized in this State. Kinnan v. Globe Indemnity Co., 233 Ill. App. 451; Kinnan v. Hurst Co., 317 Ill., 251.

243 I.A. 539

We are of the opinion that the policy is a contract to indemnify the insured against loss or damage and to pay all final judgments rendered against the insured. In paragraph 4 of the policy the company undertakes "to indemnify the subscriber against any loss and damage resulting from legal liability;" in paragraph 5, "to indemnify the subscriber against any and all loss and damages resulting from legal liability;" and in special provisions the defendant agrees "(a) to defend in the name and on behalf of said subscriber and at the cost and expense of the Association all claims, demands or suits arising under the coverage extended thereunder. (b) To pay all actual costs and expenses incurred in any and all such defenses, and to pay all final judgments rendered against said subscriber, wherein same specifically comes within the coverage extended thereunder, but in no case to exceed the maximum limits of liability in this policy provided." (Italics ours.) We find nothing in conflict with an agreement to pay the judgment in question. The words in subsection (b) above, "wherein same specifically comes within the coverage extended thereunder," relate to the "Property Damage Coverage" in the preceding paragraph 4.

Under the above construction of the policy the judgment is right and is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

4.

256 - 31076

JOSEPH SANDMAN,
Appellee,

vs.

ELMER BENESCH,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 599

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is a suit, tried by the court, for the recovery of a broker's commission, in which plaintiff had a judgment for $1250, from which defendant appeals.

The judgment must be reversed for the reason that plaintiff did not procure parties ready and willing to perform.

Defendant was the owner of a moving picture theater in Chicago, and was approached by plaintiff, a real estate broker, with a view to effecting a lease, who produced Morris Lozansky and Abe Katz as prospects. March 21, 1925, a conditional agreement was signed, which recited, among other things, that defendant had received from Lozansky and Katz the sum of $2,000 as a deposit on the lease and that the "terms of lease to be settled at lawyer's office Monday at 1:00 P. M. *** All other subjects must be agreeable to both parties." Lozansky then gave defendant his check for $2,000. This occurred on Saturday evening. On Monday morning defendant went to the bank to have the check certified and was informed that payment of it had been stopped. This check was introduced in evidence and it is stamped "payment stopped." Monday the parties came to Mr. Levit's office and plaintiff was informed that payment of the check had been stopped, but he requested that defendant say nothing to the proposed buyers as "it would just spoil the deal."

2431.A. 599

MR. JUSTICE MCGURREY DELIVERS THE OPINION OF THE COURT.

This is a suit, tried by the court, for the recovery of a broker's commission, in which plaintiff had a judgment for $1,250, from which defendant appeals.

The judgment must be reversed for the reason that plaintiff did not promote parties ready and willing to perform, in Chicago, and was employed by plaintiff, a real estate broker, with a view to effecting a lease, who produced Morris Kennedy and Abe Katz as prospects. March 21, 1929, a memorandum was signed, which recited, among other things, that defendant had received from Kennedy and Katz the sum of $3,000 as a deposit on the lease and that the "terms of lease to be settled at lawyer's office Monday at 2:00 P. M." All other negotiations must be agreeable to both parties." Kennedy then gave defendant his check for $3,000. This occurred on Saturday evening. On Monday morning defendant went to the bank to have the check certified and was informed that payment of it had been stopped. This check was introduced in evidence and it is stamped "payment stopped Monday the parties came to Mr. Levi's office and plaintiff was informed that payment of the check had been stopped, but he refused that defendant only wanted to be protected because he "it would just spoil the deal."

At this conference the parties were unable to agree on various terms of the lease relating to heating, redecorating, janitor's service and other important items. About five days later the attorney for Lozansky and Katz drew up a lease which the defendant agreed to accept, but when they were told that defendant was ready to sign they gave notice that they would not execute it and that the deal was off. Defendant's attorney then wrote a letter to Lozansky and Katz expressing the willingness of the defendant to execute the lease, but no answer was made. Plaintiff testified somewhat uncertainly that defendant promised to pay him a commission, which was denied by the defendant.

Obviously the agreement of March 21st did not amount to a valid contract, but left the terms of the lease subject to subsequent agreement, which failed. Under these circumstances the plaintiff did not procure parties who were ready and willing to enter into a lease with the defendant, and hence did not perform the services for which he claims a commission.

This case is governed by the rule that, if any portion of the proposed terms is not settled or no mode is agreed on by which it may be settled, there is no agreement. 13 C. J. 264, and cases there cited.

> "If something is reserved for the further agreement of both parties, the promise can give rise to no legal obligation until such further agreement." Vol. I, Williston on Contracts, p. 78.

See also Eaden v. Swanson, 320 Ill., 198.

For the above indicated reason the judgment is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Matchett and Johnston, JJ., concur.

reversed with a finding of fact.

For the above indicated reason the judgment is re-

We find that no binding contract was entered into between the defendant and Lozansky and Katz, and that plaintiff did not procure parties ready and willing to enter into a lease with the defendant.

6 - 30288

LESLIE P. VOORHEES and LUCIEN E. HARDING, as Trustees under the Last Will and Testament of Amos J. Harding, Deceased,
Defendants in Error,

vs.

RACHEL HARDING RUSSELL, JOHN S. HARDING and DWIGHT S. HARDING,
Plaintiffs in Error.

243 I.A. 599

ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted by Rachel Harding Russell, a legatee under the last will and testament of her father, Amos J. Harding, to reverse a decree entered in a suit begun by the trustees under the will for a settlement of their accounts as trustees and for the appointment of their successor.

Rachel Harding Russell filed an answer to the bill and thereafter a cross-bill, praying for a complete accounting by the trustees. She is the surviving beneficiary under the will. The decree was entered and the account stated without a reference to a master in chancery, and the only error argued in the brief of plaintiffs in error is that the court stated the account without such reference. Barnes v. Barnes, 282 Ill. 593.

The defendants in error, trustees, have filed a plea in this court, in which they allege that Rachel Harding Russell ought not to maintain her writ because after the rendition of the decree and before the suing out of the writ of error, she received and accepted from the trustees certain assets and moneys found and adjudged by the decree to be due and owing to her, namely, a certificate of interest #122 from the Corn Exchange National Bank, and $135.25 found and adjudged by the decree to be due to her, and that

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ERROR TO SUPERIOR COURT
OF COOK COUNTY.

she executed and delivered her receipts for these assets and cash, and the same appear in the record. Thereby, it is alleged, she released and waived any and all errors in the records and proceedings, if any such error or errors there be.

Rachel Harding Russell has filed a replication to this plea, in which she says that she ought not to be barred, because the certificate of interest #122 mentioned in the plea was, prior to and at the time of the entry of the decree, admitted by complainants to be the exclusive property of the defendant, plaintiff in error, and that she was absolutely entitled thereto, and that the reversal of the decree will not affect her right to said certificate; further that the cash amounting to $135.25, mentioned in the said plea, was, prior to and at the time of the entry of the decree, her exclusive property, and was admitted by complainants, defendants in error, to be such; that she was absolutely entitled thereto, and the reversal of the decree will not affect her right thereto.

The replication further avers that the certificate of interest and cash aforesaid were not received and accepted by Rachel Harding Russell as assets and moneys found and adjudged by the decree to be due and owing to her, and were not received and accepted by her with full knowledge that the same were delivered to her in pursuance of the decree, and that the receipts mentioned were not executed and delivered by her with full knowledge of the contents thereof.

That the voluntary acceptance of the benefits of a decree, with knowledge by a party thereto, operates as a release of error, and that such a party will not be permitted to attack the decree the benefits of which have been thus accepted, seems to be well settled in this state. Thomas v. Negus, 2 Gil. 700; Morgan v. Ladd, 2 Gil. 414; Holt v. Reid, 46 Ill. 181; King v. King, 215

Ill. 100.

Where the plea raises an issue of fact which cannot be tried by the record, it seems the usual practice is to refer the issue to the trial court in order that it may be there tried and the result certified to the appellate tribunal. Moore v. Williams, 132 Ill. 591.

An examination of the suggestions made by the respective parties and a comparison of the same with the record indicates, however, that the issues here raised by the pleadings can be tried out by the record.

The final decree in this cause was entered on July 19, 1923. It is suggested in behalf of Rachel Harding Russell that an order entered prior to that time, on May 8, 1923, providing that distributions upon the certificate of interest of the Corn Exchange National Bank established the ownership and right to immediate possession of the certificate itself in Rachel Harding Russell, so that at the time of the entry of the decree the same was already admittedly her property.

The order, as the same appears in the record, however, does not bear out that contention. It appears therefrom that it was made to appear to the court that the trustees of the estate had collected, among other sums, $540, for distributions upon this certificate of interest, and that the trustees held and treated the same as part of the capital of the trust estate; that the court found that the said sum so received was distributed out of the profits and constituted income to the trust estate when and as received; and it was therefore ordered that the trustees were authorized to treat as income this and other sums collected to the total amount of $868.50, and to make distribution thereof, it being understood, however, that upon distribution to the beneficiary, Rachel Harding Russell, the trustees might deduct therefrom the

sum of $348.03, as shown by said trustee's account to have been overpaid to her from the income. It is therefore apparent that this certificate did not by the terms of that order become the absolute property of Rachel Harding Russell, but, on the contrary, it appears from this order and from the account that the same was regarded as belonging to the corpus of the estate.

It is also suggested by defendant and plaintiff in error Rachel Harding Russell, that the $135.25 which she received was a part of the sum of $868.50, which was directed to be paid to her under the said order of May 8th, and that as a matter of fact after the payment of said sum of $135.25, there is still due the sum of $25.22 under the said order of May 8, 1923. As complainants, however, point out, it is clear that defendant in error has misapprehended the state of the record in this respect, since the decree itself recites that these sums named in the order of May 8, 1923, were theretofore paid to defendant in error.

We conclude that, having accepted the benefits of the decree (her receipts appearing in the record), and the replication failing to state any facts which would indicate that the same were not received voluntarily and with knowledge, we must hold that the acceptance of these benefits operates as a release of error, and that the writ of error must be dismissed.

WRIT OF ERROR DISMISSED.

McSurely, P. J., and Johnston, J., concur.

46 - 30856

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOSEPH R. WILE,
Plaintiff in Error.

243 I.A. 600

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Upon trial by the court without a jury, plaintiff in error was found guilty under an information which charged that he "on the 29th day of November, A. D. 1924, at the City of Chicago, aforesaid, did then and there wilfully and feloniously and fraudulently and with the intent to cheat and defraud, by means of a fraudulent check obtained from this affiant a check for $300 which was the equivalent of $300 in United States currency, all the personal goods and property of the said affiant. The said Joseph R. Wile tendered this affiant a check for $300 drawn on the Sheridan Trust and Savings Bank of Chicago, made payable to cash and signed Jos. R. Wile, when at the time the said Jos. R. Wile did not have sufficient funds or credit with said Bank."

There were motions for a new trial and in arrest of judgment, and defendant, plaintiff in error, was sentenced to confinement in the House of Correction for the term of one year and to pay a fine of $1000 and costs.

It is the contention of the defendant, plaintiff in error, that the information does not charge any crime sufficient to sustain the judgment.

It is well settled in this state that an information or indictment which does not substantially charge a crime will not sustain a conviction and that the same will be reversed on writ of error, even if the defendant has pleaded guilty. The

reason for the rule is apparent. When an information or indictment does not charge an offense, then the defendant does not admit the commission of an offense by pleading guilty to doing the thing charged. Of many cases which might be cited we will refer to Klawanski v. People, 218 Ill. 481; People v. Weiss, 168 Ill. App. 502; People v. Rufo, 313 Ill. 380.

It is apparent that the supposed offense for which the defendant was prosecuted was the crime defined by an Act to punish the making, drawing, uttering or delivering of checks, drafts or orders for the payment of money with intent to defraud, approved May 26, 1917. That Act provides that any person who with intent to defraud shall make, draw, utter or deliver any check, draft or order for the payment of money upon any bank or other depositary, and thereby obtain from any person any money, personal property or other valuable thing, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depositary for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor. See Smith-Hurd Ill. Rev. Stat. 1925, chapter 38, section 255, page 901.

The State's Attorney contends that the information should be regarded as describing a single transaction, while plaintiff in error contends that it describes two offenses. If it is to be construed in the latter sense, it is apparent that neither paragraph charges the substance of the crime. The first paragraph of the information does not allege the name of the bank upon which the check was drawn, while the last paragraph does not allege that the supposed offense was committed in the City of Chicago.

Again, if we construe the two paragraphs as describing one supposed offense, it is apparent that a substantial element of the crime described in the statute is omitted in that it is not alleged that the defendant knew at the time of making, drawing,

uttering or delivering the check that there were not sufficient funds or credit at the bank to pay it.

That such knowledge is a substantial element of the crime is apparent from reading the statute. It has been so held by the Supreme Court of this state in People v. Westerdahl, 316 Ill., 86.

For the reasons indicated the judgment will be reversed.

REVERSED.

McSurely, P. J., and Johnston, J., concur.

97 - 30914

MARTHA HYDEMAN,
Appellee,

vs.

JAMES WALSH, E. E. WALSH and
WALSH TIRE COMPANY, a Corporation,
Appellants.

243 I.A. 600

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued E. E. Walsh, his son, James Walsh, and the Walsh Tire Company, a corporation, of which the father is president, in an action on the case.

The declaration alleged that on October 10, 1923, while the plaintiff was driving her motor vehicle in a westerly direction on Roosevelt Road, DuPage County, Illinois, in the exercise of due care, defendants drove another motor vehicle in an easterly direction on said road, and the driver thereof so carelessly operated it that it collided with the motor vehicle of the plaintiff, damaging it.

In a second count it was alleged that defendants were negligent in that they drove at a high and excessive rate of speed. The third count charged that defendants operated the vehicle wilfully, wantonly and maliciously, at a high rate of speed.

The corporation filed a plea of the general issue and a second plea denying that it managed or operated the automobile which was alleged to have damaged the vehicle of the plaintiff.

The cause was tried by the court without a jury, and the court found that the defendant, James Walsh, was not guilty, and defendant Walsh Tire Company, a corporation, guilty on counts

243 I.A. 600

JAMES WALSH, M. E. TAGGE and
WALSH TIRE COMPANY, a Corporation,
Appellants,

vs.

[illegible]
Respondent.

MR. JUSTICE MCKENNA DELIVERED THE OPINION OF THE COURT.

The plaintiff sued E. B. Walsh, his son, James Walsh, and the Walsh Tire Company, a corporation, of which the latter is president, in an action on the case.

The declaration alleged that on October 20, 1902, while the plaintiff was driving her motor vehicle in a westerly direction on Roosevelt Road, DuPage County, Illinois, in the exercise of due care, defendants drove another motor vehicle in an easterly direction on said road, and the driver thereof so carelessly operated it that it collided with the motor vehicle of the plaintiff, damaging it.

In a second count it was alleged that defendants were negligent in that they drove at a high and excessive rate of speed. The third count charged that defendants operated the vehicle wilfully, wantonly and wantonly, at a high rate of speed.

The corporation filed a plea of the general issue and a second plea denying that it managed or operated the automobile which was alleged to have damaged the vehicle of the plaintiff.

The cause was tried by the court without a jury, and the court found that the defendant, James Walsh, was not guilty, and defendant Walsh Tire Company, a corporation, guilty on counts

one and two, over-ruled motions of the corporation for a new trial and in arrest of judgment, and entered judgment in favor of the plaintiff in the sum of $880.

The record does not disclose how the case was disposed of as to defendant E. E. Walsh.

The question argued and to be determined on the record is whether the corporation was liable on the undisputed facts which appear in evidence.

The facts appear to be that at the time in question Edwin E. Walsh, father of James Walsh, was president of the defendant corporation, the Walsh Tire Company. The defendant James Walsh, his son, at times worked for the corporation, but was not an officer of it. At the time of the accident James Walsh was driving the car which belonged to the corporation and did not belong to his father. James Walsh was then eighteen years of age. He had worked for the Walsh Tire Company practically all his life. He did not have anything to do with the control of the company; he did not know any of the officers of the corporation, with the exception of his father. The father had an automobile of his own which he drove, and he never in fact drove this car of the corporation, which was kept in a garage where the corporation had its place of business. James Walsh was accustomed to go there and get the car whenever he wanted it. On the day of this accident young Walsh had used the car in making collections for the corporation. At this time he was attending school, and he got the car just after school closed for the day and used it in making collections and returned it to the garage. Then, solely for the purpose of a pleasure trip, he took the car out, took two of his young lady friends upon the ride during which the accident occurred. The drive taken was not in any way for the benefit of the corporation or in connection with any of its business, but the

father, who was president of the corporation, knew that his son was accustomed to use the car for pleasure trips and seems to have authorized such use.

Although the court found that the driver was not guilty (which would seem to indicate that he was not negligent), that question is not argued in the briefs, and we shall assume, for the purposes of this decision, that the driver was negligent.

There has been much conflict in the authorities of this and other states as to when and under what particular circumstances a parent owner of an automobile used for the pleasure of the family is liable for injuries sustained as result of negligent driving thereof by a member of the family.

The latest expression of our Supreme court on this subject is found in Gates v. Mader, 316 Ill. 313, where, by a divided court, Arkin v. Page, 287 Ill. 420, was distinguished on the ground that in that case the minor son who drove the car was not using the car "for pleasure or for any family purpose."

The court there followed Graham v. Page, 300 Ill. 40, and in its opinion quotes with apparent approval its dictum in Arkin v. Page, supra, saying: "We said in that case that the weight of authority supported the liability of the owner of a car kept for family use and pleasure when an injury was negligently caused by it while driven by one of his children."

We understand from this decision that our highest court has accepted the "family purpose" theory of liability in such cases. That doctrine, however, has not, so far as we are aware, in any state been extended so as to make a corporation, controlled by the head of the family, liable in this class of cases

The plaintiff cites a line of cases, following Venables v. Smith, 2 Queen's Bench 279, where a distinction was

drawn between cases where a vehicle is entrusted by a master to a servant under specific instructions as to its use, and those cases where the master authorizes the use of the vehicle generally, holding the master not liable in the first class of cases, but liable in the second.

Davis v. Jeffords-Schoenmann Prod. & Brok. Co., 261 S. W. 401; Mulvehill v. Bates, 31 Minn. 364, and Tuttle v. Dodge, 116 S. W. 627, are also cited, and an examination of these cases shows that the principle announced in Venables v. Smith, supra, was applied in them.

We do not think the rule is applicable to the facts which appear here. In Venables v. Smith, supra, the court was of the opinion that by reason of a statutory enactment the relationship of master and servant existed. There is no such statute here. The work of young Walsh had entirely ceased for the day, and he was not, in our opinion, the servant of the corporation while enjoying this particular ride. On the contrary, he was simply the bailee of the automobile; and it has never yet, we think, been held that a bailor is in such cases liable for the negligence of the bailee.

But if it be conceded that the relationship of master and servant existed, this pleasure trip was not in any sense within the scope of the employment of young Walsh. The corporation was not organized for the purpose of furnishing pleasure and amusement to the sons of its officials (or to anyone else) so far as appears from the record. We do not quite understand what plaintiff means by referring to the defendant company as a "family" corporation. There is no proof in the record that the father is the owner of all the stock. It would be rather difficult to define what a "family" corporation is. Plaintiff does not attempt to define it. Presumably the head of the family would necessarily be a holder of

stock. But how much?

Since no judgment was entered against the father, we need not consider the question of his liability or non-liability. We hold as a matter of law that the corporation was not liable. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

121 - 30939

SIEBOLD SCHAEFFER CO.,
Appellee,

vs.

McNEIL & HIGGINS CO., WHOLESALE GROCERS CORPORATION, and DURAND-McNEIL-HORNER CO.,
Appellants.

243 I.A. 600

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit upon trial before a jury a verdict was returned for plaintiff in the sum of $7500. A remittitur of $5000 was required, whereupon motions of defendants for a new trial and in arrest were over-ruled and a judgment for $2500 entered.

The plaintiff contends that the bill of exceptions does not purport to contain all of the evidence had and received in the cause, and that consequently it will be presumed in this court that the evidence supported the verdict. It is true that the certificate of the trial Judge does not contain any statement that the bill of exceptions contains all of the evidence had and received in the cause. The bill of exceptions does, however, show the following facts. It recites that the cause came on for trial on December 14, 1925, before one of the judges of the court sitting on the common law side thereof and the jury. "Whereupon the plaintiff, to maintain the issues on its part, thereupon introduced the following evidence." After which appear the names of certain witnesses called on behalf of the plaintiff, who were sworn and testified. Upon the conclusion of this evidence offered and received for the plaintiff, the plaintiff rested its case and thereupon the defendant moved the court in writing that the jury should be directed to find the defendant not guilty, and this instruction was refused by the court and the motion over-ruled, and "thereupon the defendant to maintain the issues on its part in-

2431.A. 500

troduced the following evidence." After the introduction of the evidence of these witnesses for the defendant, the defendant rested, and "thereupon the plaintiff to further maintain the issues in its behalf introduced the following evidence, to-wit." Thereupon "both parties rested and thereupon the jury was excused, and at the close of all the evidence" the defendant, by its counsel, moved the court in writing to instruct the jury to find the issues for the defendant and tendered with said writing a motion instructing to the same effect, which motion and writing are set up in haec verba. The bill of exceptions further shows that the instruction was refused and the motion denied by the court; that defendants excepted and that after the jury returned the verdict a motion for a new trial was entered by defendants, which motion was denied and to which ruling defendants excepted, and that defendants moved in arrest of judgment; that this motion was overruled and that defendants again excepted, and that the court thereupon entered judgment.

It is quite true, as plaintiff contends, that a bill of exceptions must either expressly or by inference state that it contains all the testimony. While this bill of exceptions does not expressly so state, the inference, we think, is conclusive from the facts which itdoes state and which are above recited. Marine Bank of Chicago v. Rushmore et al., 28 Ill. 463; Hill v. Chicago City Ry. Co., 126 Ill. App. 152; People v. Scanlan, 265 Ill. 609. We hold, therefore, that the bill of exceptions is sufficient.

The judgment for the defendants is joint, and it is contended in the first place that the judgment must be reversed because the court erred in entering judgment against the three defendants, as the record affirmatively shows that there was no joint liability. The conclusion which we have reached on this

point will make it unnecessary to discuss other errors assigned and argued. The declaration as amended averred that on December 7, 1920, McNeil & Higgins Co. entered into a written agreement which is set up in haec verba. It provides in substance that for a period of five years the plaintiff agreed to furnish sufficient and suitable auto trucks to haul and deliver all goods and wares which McNeil & Higgins Co. may desire hauled into or out of its place of business in Chicago and suburbs; that plaintiff will furnish and keep in repair sufficient five-ton trucks with the name of McNeil & Higgins Co. painted in gold letters and on the panels the words "None-such Food Products" in gold letters, and to pay for the phrase "Shield of Quality" to be painted on the auto trucks and keep the same in good condition; that plaintiff will furnish covers, tackles and skids, and chauffeurs and pay helpers $60 a week, and that plaintiff "expressly agrees to do all of said teaming, hauling and delivering and returning of said goods satisfactory to the said McNeil."

Other provisions of the contract provide for a compensation to be paid, and the contract also provided that plaintiff agreed to pay "to the said McNeil as liquidated damages $10,000 if he is guilty of a breach of any of the covenants contained in this agreement." The contract is signed McNeil & Higgins Co., by M. J. McNeil, Vice President, and Siebold Schaeffer Co. Philip J. Siebold, President.

The declaration further avers that plaintiff immediately began to do hauling under the contract; that it further performed the contract and all its provisions to the satisfaction of the said McNeil until prevented from further performance thereof by the defendant, but that defendant failed to give its general city teaming, hauling and delivery to plaintiff, and on August 26th refused to allow plaintiff to do any more hauling, whereby the plaintiff was deprived of the compensation provided

for in its contract.

The declaration also averred "That McNeil & Higgins Co. merged into Wholesale Grocers Company, and that the Wholesale Grocers Company assumed the debts and obligations of McNeil & Higgins Co., and is now doing business under the name of Durand-McNeil-Horner Co." Attached to this declaration were the common counts. Defendant McNeil & Higgins Co. filed a plea of the general issue.

It is not argued in behalf of plaintiff that the declaration avers or that the proof in fact shows a joint liability, and it is conceded that if the judgment is erroneous as to any one of the three defendants, then it must, under well established rules in this state, be reversed.

The plaintiff, however, does contend that since the question of non-joint liability was not raised by special plea in bar or in abatement, the necessity of such proof was not necessary under Section 54 of the Practice Act, chapter 110, Smith-Hurd Ill. Rev. Stat. 1925, which provides that in actions upon contracts express or implied, against two or more defendants as partners or payors, whether they are so alleged or not, proof of the joint liability or partnership of the defendants shall not in the first instance be required to entitle the plaintiff to judgment, unless such proof has been rendered necessary by pleading in abatement or in bar. That section has been considered in many cases which are cited and relied on by plaintiff, as well as by defendant. Imperial Hotel Co. v. H. B. Claflin Co., 175 Ill. 119; Hamilton v. Century Manfg. Co., 180 Ill. App. 100; International Packing Co. v. Tone, 165 Ill. App. 248; Heifelmeier v. Hecht, 145 Ill. App. 116; and Martin v. Nelson, 33 Ill. App. 517.

The law as laid down in these decisions is explicit, and it is clear, we think, that the statute does not apply in a case where the pleading upon the face of it affirmatively shows

that the liability, if any, is several and not joint. That appears to be the case here not only from the pleadings but from the contract which was offered in evidence. The contract is between plaintiff and McNeil & Higgins Co. The other defendants are not named as parties to it. The pleading avers that McNeil & Higgins Co. "merged" into one of the other corporations defendants, and that that corporation assumed the debts and obligations of McNeil & Higgins Co. What the nature of that merger was is not averred. If it was a merger under the provisions of the statute, the effect presumptively would be to dissolve the one corporation and create another. Southern Ill. Gas Co. v. Commerce Commission, 311 Ill. 299. In that case McNeil & Higgins would have ceased to exist and therefore could not be jointly liable with its successor, although the latter assumed the payment of its predecessor's obligations. On the other hand, if the merger was brought about through contract and not under the provisions of the statute, it is again apparent that McNeil & Higgins Co. did not change its identity nor become identical with its successor, the Wholesale Grocers Corporation. As defendants point out, the record negatives joint liability because it affirmatively shows the absence of the unity of time which is essential to joint liability. See Words and Phrases, 2nd series, vol. 2, p. 1252.

The cases cited show conclusively that plaintiff can not recover in this case for a joint liability; that the judgment is erroneous as to the defendants Wholesale Grocers Corporation and Durand-McNeil-Horner Co., irrespective of its merits as against McNeil & Higgins Co.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, H., concur.

166 - 30985

CHARLES T. KRAMER,
Appellee,

vs.

GEORGE HALLECK TAYLOR,
Appellant.

243 I.A. 600

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $200, entered upon the verdict of the jury, which was instructed by the court to return said verdict at the close of all the evidence.

The claim of plaintiff was for interest alleged to be due and payable by the terms of certain notes which the statement averred had been executed by the defendant to the order of Robert Ward and by said Ward endorsed and delivered for value received to the plaintiff before maturity.

The affidavit of merits denied that defendant ever executed the notes mentioned "and alleged in the plaintiff's statement of claim;" denied that he ever delivered the notes to Robert Ward or to anyone else; denied that the plaintiff was the legal holder thereof, and alleged that on, to-wit, March 19, 1924, Robert Ward obtained possession of the said notes by fraud and under the terms of a trust receipt wherein said Ward agreed that the notes mentioned in the plaintiff's statement of claim were taken, among others, to be exchanged for other outstanding unsecured notes of George H. Taylor which had been theretofore given to Ward; that in said trust agreement said Ward agreed to return to the defendant all of the foregoing notes, together with others obtained at the same time, within ten days from March 19, 1924, if said unsecured notes were not obtained, and that no other use of said notes mentioned in the plaintiff's statement of claim

CHARLES E. [illegible],
Appellee,

vs.

[illegible] TAILOR [illegible],
Appellant.

2431.A. 600

ACTION UPON MUNICIPAL COURT
OF CHICAGO.

IN. HOLDING MUNICIPAL MAGISTRATE NOT GUILTY OF ABUSE OF DISCRETION.

This is an appeal by the defendant from a judgment in the sum of $300, entered upon the verdict of the jury, which was instructed by the court to return said verdict at the close of all the evidence.

The claim of plaintiff was for interest alleged to be due and payable by the terms of certain notes which the statement had been executed by the defendant to the order of Robert Ward and by said Ward endorsed and delivered for value received to the plaintiff before maturity.

The affidavit of merits denied that defendant ever executed the notes mentioned "and alleged in the plaintiff's statement of claim;" denied that he ever delivered the notes to Robert Ward or to anyone else; denied that the plaintiff was the legal holder thereof, and alleged that on, to-wit, March 19, 1894, Robert Ward obtained possession of the said notes by fraud and under the terms of a trust receipt wherein said Ward agreed that the notes mentioned in the plaintiff's statement of claim were taken, among others, to be exchanged for other satisfactory accepted notes of Hodge & Taylor which had been theretofore given to Ward; that in said trust agreement said Ward agreed to return to the defendant all of the [illegible] notes, together with others obtained at the same time, within ten days from March 19, 1894, if said [illegible] notes were not obtained, and that no other use of said notes mentioned in the plaintiff's statement of claim

would or could be made; that Robert Ward did not at any time return said unsecured notes and did not at any time return to the defendant any of the notes described in the plaintiff's statement of claim; denied that the plaintiff was the legal holder thereof, or that he obtained the same without notice; alleged that defendant received no consideration therefor, and alleged that the plaintiff did or could have known, by the exercise of ordinary care, that said notes were without consideration and were not executed or delivered by the defendant.

Upon trial the plaintiff produced the notes, which (he testified) he received together with the trust deed in part payment of a real estate deal with Robert Ward on July 1, 1924; that Ward purchased from plaintiff a building located at 923-925 Irving Park Boulevard and paid him a part in cash and also gave him in part payment these notes, together with some other notes of the defendant.

The trust deed was also produced, and plaintiff testified that he received it July 1, 1924, and that he had computed the total interest due at $200.

The notes and trust deed were admitted in evidence, and it appears that these notes were signed by the defendant, each for the sum of $240, drawing interest at the rate of six per cent per annum, payable annually, and each to the order of Robert Ward and by him endorsed without recourse.

The foregoing was all the evidence submitted. Thereupon defendant requested an instruction to the jury to return a verdict for the defendant, which was denied, and a motion in behalf of plaintiff to instruct the jury to return a verdict for the plaintiff was given. Motions of defendant for a new trial and in arrest of judgment were also over-ruled.

The defendant contends on the authority of Bippus v.

Vail, 230 Ill. App. 633, that the court erred in denying the motion of the defendant to instruct the jury to return a verdict in defendant's favor at the close of the evidence. He argues that the burden was upon the plaintiff to prove that he was the owner of the notes and also the delivery of the notes by the maker. He urges that the record fails to show any evidence tending to show these material averments.

Bippus v. Vail, supra, is not, we think, controlling. In that case there was a verified plea denying the execution of the note sued on in conformity with the provisions of Section 52 of the Practice Act. See Smith-Hurd Illinois Rev. Statutes, chapter 110, pages 1957-1958. This section provides:

> "No person shall be permitted to deny, on trial, the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, or is admissible under the pleadings, when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit; and if plaintiff shall file his affidavit denying the execution or assignment of such instrument; Provided, if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party."

On the same date that this section was re-enacted (for substantially it is a re-enactment of previous statutes) the legislature passed the Negotiable Instruments Act. Smith-Hurd's Rev. Stat. p. 1760, Section 16 of which provides in part:

> "*** But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

In Bippus v. Vail, supra, it was stated that these two sections, namely, Section 52 of the Practice Act and Section 16 of the Negotiable Instruments Act, were not inconsistent or in conflict. That case apparently over-rules Woltzen v. Weinman, 168

Vail, 220 Ill. App. 622, that the court erred in denying the motion of the defendant to instruct the jury to return a verdict in defendant's favor at the close of the evidence. He argues that the burden was upon the plaintiff to prove that he was the owner of the notes and also the delivery of the notes by the maker. He argues that the record fails to show any evidence tending to show these material averments.

Turner v. Vail, supra, is not, we think, controlling, in that case there was a verified plea denying the execution of the note sued on in conformity with the provisions of Section 52 of the Practice Act. See Smith-Hurd Illinois Rev. Statutes, chapter 110, years 1937-1938. This section provides:

"In actions wherein it is provided to deny on trial, the execution or genuineness of any instrument in writing, whether sealed or not, upon which any action may have been brought, or upon which it is alleged or set up by way of defense or set-off, or in actions where the pleadings, when a copy is filed, admits the person so denying the same shall, if defendant, verify his plea by affidavit; and if plaintiff shall file his affidavit denying the execution or genuineness of such instrument; provided, if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party."

On the same date that this section was re-enacted (Jan 1, 1933) substantially it is a re-enactment of previous statutes) the Legislature passed the Negotiable Instruments Act. Smith-Hurd's Rev. Stat. p. 1760, Section 52 of which provides in part:

"... But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

In Mitchell v. Vail, supra, it was stated that these two sections, namely, Section 52 of the Practice Act and Section 52 of the Negotiable Instruments Act, were not inconsistent or in conflict. That case apparently overruled Bullock v. Talmage, 166

Ill. App. 220, which held that the two sections were inconsistent and that as Section 16 was specific while Section 52 was general, Section 16 must be held to supersede said Section 52.

In Bippus v. Vail, supra, apparently, Stickel v. Neibuhr, 221 Ill. App. 606, was not called to the attention of the court. That was an appeal from a case heard in the Circuit court of Logan County, and defendant filed a verified plea denying the execution of the note sued on. Upon the trial the signature to the note was proved, but there was no direct evidence as to the delivery of it, and the court gave a peremptory instruction for the defendant. The Appellate court for the Third District, however, reversed the judgment, stating that as the evidence showed plaintiff was in possession of the note at the trial of the claim (she having produced and offered it in evidence), that fact was prima facie evidence that it had been delivered.

In Brannan's Negotiable Instruments Law, Annotated, 4th edition, 1926, page 130, the author states that this section 16 applies even to the case of an undelivered bill or note made payable to order, stolen by the payee, endorsed by him and negotiated to a holder in due course, thus codifying such extreme c cases as Clarke v. Johnson, 54 Ill. 296, and Shipley v. Carroll, 45 Ill. 285.

We agree with Bippus v. Vail, supra, that there is no necessary conflict between the provisions of Section 16 of the Negotiable Instruments Act and Section 52 of the Practice Act. Section 52 limits the circumstances under which a defendant may be permitted to deny the execution or assignment of an instrument in writing. It does not define what shall or shall not be considered presumptive evidence thereof. Section 16 covers that subject, as to suits on negotiable instruments, and as the later enactment of the legislature changes any rule which may have been

announced in decisions prior thereto which is inconsistent therewith.

Here the evidence was sufficient to prima facie show a delivery and that plaintiff was the owner. Defendant did not avail himself of his privilege under the affidavit to offer evidence to the contrary. In the absence of evidence tending to support these or any other defenses, the court properly instructed the jury to find for the plaintiff.

We have assumed that the affidavit of merits was sufficient to allow proof of the defense. There is much doubt, however, whether it was in fact sufficient. It does not deny that defendant signed the notes. While it alleges, as a mere conclusion, that the defendant did not execute the same, the specific facts set forth in the affidavit tend to show that he did in fact execute and deliver them.

The court did not err in instructing the jury to return a verdict for the plaintiff for the amount shown to be due. The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

188 - 31007

MICHAEL C. YUNKER,
Appellee,

vs.

CATHERINE CORDELL,
Appellant.

243 I.A. 600
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued for the value of services alleged to have been rendered by him in the way of assisting defendant in gathering evidence for use in a prospective suit for divorce from her husband, in removing and storing certain furniture belonging to defendant and for storage charges for the same, and for the use of his automobile in performing these services. The items of service were specified in detail in the statement of claim and two payments amounting to $130 credited thereon, leaving a claimed balance of $2649. These supposed services covered a period from March 12, 1919, to May 10, 1923.

The affidavit of merits denied that any services in connection with shadowing defendant's husband had been performed by the plaintiff except on March 14, 1919, and March 22, 1922, and these, it averred, were not rendered at the request of plaintiff. The affidavit admitted that plaintiff assisted in removing the furniture and storing it, but alleged that this service was voluntary on his part without suggestion of remuneration.

There was a trial by jury and a verdict for $500, upon which the court, over-ruling motions of defendant for a new trial, and in arrest, entered judgment.

It is first contended in defendant's behalf that the court erred in admitting evidence of the plaintiff as to the value of these services without proper foundation being first laid, in that the evidence failed to show defendant's knowledge of the

2431.A. 600

usual and customary charges for such services.

Plaintiff was neither a detective, warehouseman, nor cabman, and the services which it is claimed he rendered were quite unusual in their nature. We do not think that there was any established and customary charge therefor, and that under these circumstances his evidence as to the fair and reasonable charge was admissible. Chicago & Eastern Ill. R. R. Co. v. Mevans, 142 Ill. 401; Schumbrecht v. Chicago City Ry. Co., 153 Ill. App. 254; Fleming v. Chicago City Ry. Co., 163 Ill. App. 185. If there was error in the admission of this evidence, we do not think it was reversible.

The defendant, however, further contends that the verdict is against the manifest preponderance of the evidence, and it must be conceded that as to number of witnesses the preponderance of evidence on some material facts is with the defendant. But the differences between the parties out of which the suit arises take on somewhat of the nature of a family quarrel, since the sister of plaintiff is defendant's daughter-in-law. It does not appear that any bill for services was ever rendered, and it is apparent that the items, as specified in the statement of claim, were largely an afterthought. That the jury so regarded them is apparent from the fact that for items claimed amounting to $2649, only $500 was allowed.

On the other hand it is apparent that there is some liability for some services which the plaintiff performed. The testimony shows (and it is not contradicted) that the attorney for the defendant suggested that plaintiff's services were worth $50, and the defendant paid $100, giving a check which the jury was justified in finding was on account. Plaintiff charged for 1091 hours at $2 an hour. It appears that 570 of these hours were spent in going to the attorney's office, in attending court and keeping

defendant informed. There is no proof of request by defendant or of necessity of performance of such services. Further charges for storing goods and for the use of automobile are also, we think, entirely groundless.

The first definite demand for compensation was made by plaintiff to defendant's son, Arthur J. Cordell, and at that time when plaintiff was asked what he wanted he would not say, but the next day he made a demand for $300.

This evidence is not contradicted, and after considering all the evidence the court is of the opinion that the sum of $300 in addition to the payments which have already been made to the plaintiff will be ample compensation. If, therefore, the plaintiff will, within ten days, remit from the judgment rendered the sum of $200 it will be affirmed; otherwise it will be reversed and the cause remanded for another trial.

AFFIRMED UPON REMITTITUR;

OTHERWISE REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

215 - 31034

MAMIE E. CLARK,
Appellee,

vs.

GEORGE T. MILLER,
Appellant.

243 I.A. 601

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $1100, entered upon the verdict of a jury, motions for a new trial and in arrest of judgment having been over-ruled.

The statement of claim disclosed a demand for a balance alleged to be due on account of money loaned, and the defense set up in the affidavit of merits was that the money which defendant received from plaintiff was not received as a loan, but that plaintiff, desiring to buy an automobile, requested defendant to purchase the same for her, which defendant did, and that the various sums of money sent to defendant by plaintiff were used by him in making payments for the automobile.

The only error assigned and argued is that the court refused to grant a new trial, which, it is said, should have been allowed because the verdict was against the weight of the evidence and because the statement of claim was not supported by the evidence.

There has been no appearance in this court by plaintiff in support of the judgment. Notwithstanding, after a careful consideration of the argument of defendant as well as of the evidence, we are of the opinion that the judgment should be affirmed.

The plaintiff, the evidence tends to show, has been a widow for eighteen or twenty years. The defendant is a married man, who was first introduced to plaintiff sometime in May, 1923, at her home, and she says (and he does not deny) that he then

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vs.

Appellant.

told her "that his wife had left him in pitiful circumstances; that it had kept his nose to the grindstone."

She, plaintiff, says that defendant asked her if she would lend him money to purchase a car. He, defendant, says that as they walked and talked together she said she would buy an automobile, but that she did not wish her son-in-law to know about it. He says that she said, "I am going to buy you one and I want you to use it."

The uncontradicted evidence shows that the defendant purchased the car at 6108 Cottage Grove avenue in his own name, at a cost of $1585; that the cash paid was $615, and that the balance was payable monthly.

The uncontradicted evidence also shows that plaintiff and defendant made a trip together in the car to Idlewild, Michigan, at which time the car was damaged and the sum of $47 was spent in repairing it.

The evidence also shows that in April, 1923, being about to leave the city, plaintiff left her jewelry with the defendant, consisting of a diamond earring, two chains and a diamond ring, and that defendant pawned these for the sum of $250; that he mailed the pawn tickets to the plaintiff while she was absent from the city, and that she redeemed the same, paying the amount of the loan, with interest at the rate of $2.50 a month. Thereafter defendant wrote plaintiff, "Dear I do feel somewhat embarrassed. Dear I am sorry that I pawned your jewelry for what I did and shall get it out as soon as I can my reason for being sorry is because I did not get enough to do any good yet I have deprived you of it."

The plaintiff says that on August 23rd defendant ordered a suit of clothes "beforehis wife ran away," and that they were pressing him for money and she then loaned him $40 to pay the bill. He does not deny this.

Defendant himself testifies that he traded the automobile which he first purchased for another car, and that the first car was in his possession all the time until he traded it off. He also testifies that in the course of these transactions he built a garage on his own property in which to keep the car at a cost of $275.

An extended correspondence between these parties was placed in evidence and indicates that their relations, which were for a time warm and cordial, afterwards cooled. We do not find anything in this correspondence which would enable us to say that the verdict of the jury is against the weight of the evidence, but on the contrary we think that the correspondence tends to sustain the verdict.

The defendant indicates his thoughts about the transaction in the following language of his brief:

> "In this day and time when women have acquired such social, political and economical laxity and freedom, they can only expect to take also of the accompanying burdens, and one of these burdens is that they must stand where they fall, when they have spent their money for the companionship and association of a man friend."

This court cannot bring itself to approve of this proposition, either from the standpoint of philosophy or law.

The judgment is affirmed.

AFFIRMED.

McGurely, P. J., and Johnston, J., concur.

225 - 31044

DICKETT COAL AND COKE CO., a Corporation,
Appellant,

vs.

BINKLEY COAL CO., a Corporation,
Appellee.

243 I.A. 601

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued on a claim for a balance of $2147.18, alleged to be due to it for coal sold and delivered, and the defendant filed an affidavit of merits and a set-off, in which it claimed the sum of $3961.81, on account of allowances made by defendant to certain of its customers pursuant to an agreement with the plaintiff on account of the defective character of the coal which defendant purchased from plaintiff during December, 1922, and January, 1923.

The claim of off-set stated that during this time defendant purchased from plaintiff numerous cars of lump coal to be shipped from the Glencoe mine in Indiana; that many of the cars shipped as lump coal contained mine run coal and others contained a quantity of screenings mixed with lump coal; that as a result thereof defendant's customers in many cases refused to accept said coal as lump coal and rejected the cars upon arrival; that defendant then entered into an agreement with plaintiff that the defendant should make allowances as were necessary to induce its customers to accept such cars of coal, or to resell such coal at the best price obtainable, and to deduct from any payments to be made to the plaintiff by the defendant the amount of such allowances and the difference between the price at which coal had been sold by defendant as lump coal and the price which it was able to sell such coal for in its condition, and any expense of reconsigning

or demurrage which accrued by reason of such refusal.

There was attached to defendant's affidavit of merits an exhibit giving the list of the cars shipped as lump coal, which it was claimed contained coal of an inferior quality, showing the car numbers, weight in pounds, allowance per ton made to its customers and total allowances made to defendant, and this exhibit was by reference made a part of the defendant's set-off.

The plaintiff's affidavit of merits to the statement of set-off denied that plaintiff had shipped cars as lump coal which were as a matter of fact mine run or screenings, and denied that it ever entered into an agreement authorizing defendant to make any allowances to the purchasers from the defendant as alleged. The issues were submitted to a jury, which returned a verdict for defendant upon its claim of off-set in the sum of $1814.73, upon which the court, over-ruling a motion for a new trial, entered judgment.

The plaintiff here contends that the trial court erred in rulings on the admission of evidence, and in particular that it permitted certain exhibits to be received in evidence, which were in the nature of communications from defendant's customers, objecting to the quality of the coal delivered. Plaintiff says that these were statements of third parties and therefore not binding on plaintiff, but purely hearsay, under the rule as announced by this court in Stayer Carriage Co. v. American & British Mfg. Co., 188 Ill. App. 634, and by the Supreme Court in Capen et al. v. DeSteiger Glass Co., 105 Ill., 185.

There is no doubt of the correctness of the rule as announced in those cases where in a suit between vendor and vendee for the purchase price, statements of the customers of the vendee complaining of the quality of the goods are offered. Such

testimony is, as a general rule, to be rejected as mere hearsay. That is not applicable, however, where, as disclosed by the record here, defendant's claim of set-off is based on the theory that plaintiff failed to keep its promises to make good allowances for claimed defects by purchasers from the vendee of the coal purchased from the plaintiff.

In a suit of this nature claims made by customers of the defendant become a part of the res gestae and are admissible under the rule laid down in West Frankfort Bank v. Baretti, 206 Ill. App. 261; and Allen v. Johns-Manville Co., 211 Ill. App. 217. In such case a proof of a complaint made by the customer is an essential part of the cause of action, and such complaint when made is a part of the res gestae and therefore admissible. The distinction has been recognized by the courts of other states. See Lewiston Trust Co. v. Shackford, 100 N. E. 828; Home Banking & Realty Co. v. Baum, 82 Atl. 970.

It is next contended that the court erred in refusing to receive evidence tending to show that at the time the order for the coal was given the sales manager for the plaintiff informed the representative of the defendant that the screen at the Glencoe mine, from which the coal was to be delivered, had not been used for the period of a year, and that it would not therefore screen as freely and perfectly as it otherwise would do. Plaintiff says, "Although parol evidence is not admissible to vary the express provisions of a written contract, it is admissible where the contract is silent on a particular matter for the purpose of arriving at the intentions of the parties with reference to such matter." In support of this contention Donlin v. Baegling et al., 80 Ill. 608, is cited.

The orders of defendant for the coal shipped and the acceptances thereof by the plaintiff were in writing, and all

prior or contemporaneous oral conversations were merged in the writing. Donlin v. Daegling, supra, is a case where the plaintiff had made a contract to do certain construction work, and during the course of performing it did other extra work at the request of the defendant. Evidence of the amount of such extra work and the value thereof was therefore properly received. That case is not at all applicable to facts such as appear here. Town of Kane v. Farrelly, 192 Ill. 521; Smith v. Rust, 112 Ill. App. 84.

It is next contended that the court erred in refusing evidence as to the kind of coal shipped to defendant pursuant to the orders. It is said that the order called for "Fourth vein Glencoe coal," and that there is no evidence that the coal shipped was not of that kind; that the quality of the coal was therefore immaterial under the rule announced in Peoria Grape Sugar Co. v. Turney et al., 175 Ill. 631, and Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88. The rule applied in those cases has reference to cases in which a specific thing is purchased under its trade name. In such case there is no implied warranty for obvious reasons. The orders here in evidence are for a certain coal to be mined from a certain vein, but there is no evidence to indicate that the coal was purchased under a trade name. There was, we think, no error as argued in this respect.

The record shows that the jury were instructed as follows:

> "The jury are further instructed under the law that the burden of proof is upon the plaintiff to prove that it shipped to the defendant under the contracts in evidence, according to the tener of said contracts."

It is urged that inasmuch as the case went to trial on the issues raised by the defendant's claim of set-off and the plaintiff's affidavit of merits thereto, the burden of proof in the case was upon the defendant, and that it was not incumbent

upon the plaintiff to prove that it shipped to the defendant in accordance with the tenor of the contracts, but on the contrary it was incumbent on the defendant to prove that plaintiff did not ship coal according to the tenor of the contracts.

The instructions were given orally, and the plaintiff made certain objections thereto but did not then raise the objection that is raised here. Moreover, the instructions when considered as a whole correctly state the law. Plaintiff cannot object here to an instruction in which he acquiesced upon the trial. Kankakee & Ill. R. R. Co. v. Chester, 62 Ill. 235.

The plaintiff next contends that the verdict and judgment are contrary to the weight of the evidence. While error is not specifically assigned on this point, we have nevertheless examined the evidence and are of the opinion that the jury could properly return the verdict upon which judgment was entered. It is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

234 - 31063

E. L. ROSSET & CO., a Corporation,
Appellee,

vs.

THE FAIR ARTIFICIAL ICE CO., a Corporation,
Appellant.

243 I.A. 601

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in the trial court filed a claim in the sum of $1249.50 for a balance said to be due and owing from defendant for work, labor, services and material furnished and rendered at the request of the defendant. Attached to this statement was an itemized statement of account showing various items from December, 1922, to September 4, 1923, amounting to a total sum of $1649.50, and credit for payments made on account at various dates stated, amounting to $400.

The defendant filed an affidavit of merits and later an amended statement and affidavit of claim of set-off, setting up a demand for $1016.50, said to have been paid by it to the plaintiff, for which, it was alleged, the plaintiff agreed to audit, examine and verify all defendant's books, records and accounts from March 1, 1922, to September 30, 1923.

It was averred that plaintiff performed its work so inaccurately that said services were of no value to the defendant, and that defendant was obliged to hire and did hire an accountant to do the work for which plaintiff was employed and paid $1016.50 in order that defendant might obtain a correct examination and verification of all its books, records and accounts covering that period. Wherefore the defendant asked judgment that it might recover the amounts paid by it to the plaintiff in connection with this service in the sum of $1016.50.

The issues were submitted to a jury which returned a verdict finding the issues against the defendant, both as to plaintiff's claim and defendant's off-set, with damages in the sum of $1249.50, upon which the court, over-ruling motions for a new trial and in arrest, entered judgment, from which defendant appeals.

The first contention of the defendant here is that the court erred in admitting in evidence plaintiff's time-sheets showing work done by employees who did not testify. It is urged that this evidence, which was admitted over defendant's objection, was secondary evidence and inadmissible.

The uncontradicted evidence tended to show an agreement between the plaintiff and defendant that the plaintiff should perform the service of auditing defendant's books for an agreed compensation of $25 a day per accountant, and as tending to prove the actual service which had been rendered, plaintiff offered, and the court, over the objection of defendant, received in evidence Exhibits 1 to 48 inclusive, which were time-sheets turned in by the various employees of the plaintiff who performed this service. The evidence for the plaintiff tended to show that a part of this work was done by one of the witnesses, Mr. Foss, who was in charge of the work for plaintiff and who performed a part of the services. He identified his own time-sheets for such service performed by him, and further testified that the other accountants were working under his direction, and that he assigned them to this job, and on each day, as was the custom, called up over the 'phone and ascertained that the particular accountant assigned to the work was at the place to which he had assigned him. He testified that the sheets were true and accurate and made in the usual course of the business of plaintiff. The accountants other than Mr. Foss did not testify, and the defendant contends that their evidence was necessary in order to lay the proper foundation for the introduction of the time-sheets.

The absence of these witnesses is not accounted for, and there is no doubt that the evidence would have been of a much more satisfactory character had they been called to testify. The pleadings, however, do not present any issue as to the time spent in making the audit. There is nothing in the evidence to indicate any bad faith in this respect, nor does there appear to be any issue in the matter so far as the evidence is concerned. The plaintiff relies on Griffith v. Sanitary District of Chicago, 174 Ill. App. 100; but that case is not in point, we think, since the question which the court there decided was whether the evidence was admissible as being a public record.

We think the evidence was admissible under the rule laid down in Chisholm v. Beaman Machine Co., 160 Ill. 101, and Wylie v. Bushnell, 288 Ill. 484.

The evidence tended to show that in the audits which were made by the plaintiff there were certain typographical errors, as for instance in one case an item of $700 was set out as $700,000, and there were other errors, as in one place where in subtracting a mistake of one cent was made. The evidence for the plaintiff tended to show that as to that particular report there had been a request to hurry the matter, and this was given as the excuse for these and other similar inaccuracies.

There was evidence from which the jury would be justified in finding that the purpose in having one of the audits made was to secure the sale of a bond issue of $100,000, which the defendant company was about to make; that the audit was used for that purpose, and that it served the purpose for which it was intended; that as to another audit, the same was made for the purpose of securing a loan of $10,000 from a bank, which loan was obtained. Whatever, therefore, the inaccuracies, it seems that the defendant company took the reports and used them, and that the object for which the same were ordered was attained.

There is no evidence in the record from which the jury could determine what, if any, allowance should be made on account of these inaccuracies, and we certainly cannot hold that a corporation which accepts and uses an audit of this kind and thereby accomplishes the purpose for which the audit was made, can do so without paying for the services performed.

There is evidence tending to show that Mr. Poss, who was in charge of the accountants during the time the audit was being made, became quite friendly with Mr. Cades, who was at that time the manager and secretary of the defendant company, and during that time made a loan of $1230 to Mr. Cades. While this, from an ethical standpoint, might subject Mr. Poss to criticism in the absence of any evidence tending to show that defendant was thereby injured in any way, it furnishes no legal defense to a suit for services which were actually performed.

Indeed, the suit seems to be largely the result of bad feeling which arose between the stockholders of the company and Cades. Mr. Cades was discharged, and the evidence indicates that some of the stockholders were active in procuring his indictment on a charge of embezzlement in the Criminal court of Cook County. That matter, however, resulted in a verdict of not guilty.

One of the reasons urged for reversal is that an attorney for the plaintiff asked questions which brought these facts before the jury. This matter, however, was first brought to the attention of the jury by the counsel for defendant, who, on cross-examination brought out the fact that Cades had sued certain of the stockholders for $50,000 and was going to try to punish them for having him falsely arrested. The defendant, having brought out these matters, is not in a position to complain.

It is also urged by defendant that the court erred in permitting the witness Poss, while he was on the stand, to consult with plaintiff's attorney. In the course of his direct examination

this witness asked if he might confer with his attorney, and the defendant objected. The court, notwithstanding such objection, permitted the witness to do so. A matter of that kind is very much within the discretion of the trial court, and, in the absence of abuse of such discretion, is not reversible error. We do not think there was any reversible error in this ruling of the court.

Again, the defendant contends that the court erred in excluding from the evidence a report of an examination of defendant's books made by an accountant, one Talcoot, some time after the audits had been made by plaintiff, which report showed alleged defalcations made by Cades when he was manager. Talcott testified personally as to the facts ascertained upon his examination of these books, and his written report to the defendant was clearly inadmissible.

The defendant also contends that the judgment should be reversed on account of prejudicial remarks and arguments of plaintiff's attorney; but we find nothing in any of the statements pointed out to us which would justify a reversal.

Indeed, we think the verdict of the jury was justified, and that under the facts which appear in evidence no other verdict could have been rendered or would have been sustained. The evidence shows without contradiction that defendant made payments on the account after it had been rendered and gave as its reason for not paying further that it was hard up.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

243 - 31063

CHICAGO WOOD AND COAL COMPANY,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

243 I.A. 601
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, appellee, filed a petition praying for a mandamus directed to the City of Chicago, appellant, commanding it to pay a balance alleged to be due upon two certain judgments against said City.

The defendant filed a general and a special demurrer to the petition, which were over-ruled, and defendant electing to stand by its demurrer, it was adjudged that the writ issue.

The petition alleged that the petitioner was a corporation duly organized and existing under the laws of the State of Illinois; that on January 18, 1923, it recovered a judgment in the Circuit court of Cook county against the City of Chicago, a municipal corporation, in case No. B92806 for $38,769.64 and $11.75 costs, which judgment became "and remains final and in full force and effect;" that on, to-wit, October 19, 1923, petitioner recovered judgment in the Appellate court of Illinois, in case No. 29071, against the said City of Chicago, a municipal corporation, for $200 damages and $22.20 costs, which said judgment "remains final and in full force and effect;" that on, to-wit, April 14, 1923, defendant paid on account of the first judgment the sum of $37,519, leaving a balance dye on said judgment and costs at that time, allowing petitioner five per cent interest on its said judgment, of $1725.59; that the interest on said balance to date was

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$213.86; that the interest on the Appellate court judgment and costs from date of judgment to date was $20.25, making a total balance due upon said two judgments of $2181.90.

The petition further set up a detailed statement of the account, showing the said balance to be due, and also alleging that on, to-wit, March 1, 1925, the City of Chicago, by and through its city council and mayor, passed an appropriation bill or ordinance, in which it appropriated to pay during the calendar year of 1925 the sum of $200,000 upon judgments which had been or might be rendered against said City; that the petitioner made demand upon the comptroller of said City to pay the balance of $2181.90, due upon the aforesaid judgments; that the comptroller stated to petitioner that there was more than $50,000 of said appropriation still left in his hands which had not been exhausted by the payment of judgments against the City, and the petitioner averred that there was then in the hands of said comptroller more than $50,000 of said appropriation left unexhausted for the satisfaction of judgments against the said City, which was more than sufficient to pay the balance due upon the said judgments.

The special grounds for the demurrer were stated to be that the petition was not entitled in the name of the People of the State of Illinois; that the allegations that a judgment had been recovered by the petitioner against the City of Chicago, that the petitioner had obtained the judgment in the Appellate court, and that the City of Chicago, by its city council, made an appropriation of $200,000 or any other sum, and that there was a comptroller of the City of Chicago, were all conclusions, and therefore the petition was insufficient.

The points upon which the defendant City relies are stated to be that the rules of common law pleading apply to proceedings in mandamus; that the legal conclusions contained in the petition are not admitted by the respondent's demurrer thereto and should be disregarded; that it was requisite that the petition allege that the petitioner made a demand on the respondent to pay the judgment; that the office of comptroller is not a statutory or common law office and can be created only by an ordinance of the City of Chicago, and that no such ordinance is set up in the petition; that such municipal ordinances must be specially pleaded, as the courts will not take judicial notice thereof; and that the writ of mandamus is never granted when the right of the petitioner is doubtful.

Numerous authorities are cited in support of these propositions, which we think it will be unnecessary to review at length.

In a certain sense every allegation of fact is the conclusion of him who makes it. The allegation that a petitioner has recovered a judgment against a respondent is in that sense a conclusion; but if it is true, as alleged, it is also a fact, and good pleading does not require that the pleader should set forth the evidence upon which he relies.

The same observations are applicable to the other special grounds of demurrer mentioned. The petition does not leave any doubt in the mind of one who reads it intelligently of the right of the petitioner to a writ of mandamus in case the facts alleged are true, and a pleading which cannot be so read without making the reader understand that the pleader has a legal right to the remedy prayed for, is, or ought to be, sufficient under any system of pleading.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

The judgment is affirmed.

APPENDIX.

Kennedy, P. J., and Jamieson, J., concur.

under any system of pleading.

right to the remedy invoked for, in, or sought to be, anything appearing touching the reader understand that the pleader has a legal rights of the petitioner in a writ of mandamus in case the facts alleged are true, and a pleading which cannot be so read is bad in substance. In a matter of general interest, as in the case of the

253 - 31073

HARRY A. PILLMAN,
Appellant,

vs.

ARTHUR R. JONES, J. WALLACE WAKEM and FRANK SCHOENFELD, Partners, Doing Business under the Name of CONTINENTAL CREDIT TRUST,
Appellees.

243 I.A. 601
APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order denying his motion to vacate a judgment theretofore entered.

The material facts disclosed by the record seem to be that on June 10, 1925, plaintiffs filed a statement of claim in which they averred that defendant transferred and delivered to the plaintiffs as collateral security for a note of $3,000, signed by the defendant, payable to his own order and by him endorsed, ten certain bonds; that the plaintiffs were the owners of the note; that no part of it had been paid; that on or about August 12, 1924, the said bonds were delivered to the defendant upon a trust receipt, in and by which he agreed to redeliver the same, but that he neglected and refused to do this and converted the bonds to his own use; that the note was still due and unpaid with interest.

An affidavit was attached to the statement of claim, in which it was averred that there was due to plaintiffs, after allowing all just credits, etc., $3,045.

June 22, 1925, the defendant filed an appearance and thereafter an affidavit of merits, which was later by agreement stricken, and defendant ordered to file an amended affidavit of merits. Thereafter default of defendant for want of an affidavit of merits was entered, and August 17, 1925, defendant filed a jury waiver.

MARY V. PILLS,
Appellant,

v.

ANNIE B. JONES, J. PITTMAN,
TAYLOR and MOORE MERCANTILE, Garnishee,
Doing business under the name of
CHATTANOOGA CANDY CAKE,
Appellees.

COURT OF APPEALS.

9431.A. 601

Suit is on account by the defendant there on trial
ranging its motion to execute a judgment heretofore entered.
The motion is denied by the trial court to
that on June 10, 1932, Plaintiffs filed a statement of claim in
which they averred that defendant purchased and delivered to the
plaintiffs on credit monthly for a term of 12,000, signed by
the defendant, payable to its own order and by him endorsed, ten
certain bonds; that the plaintiffs owned the owners of the notes
that no part of it had been paid; that on or about August 13, 1932,
the said bonds were delivered to the defendant upon a trust re-
deed, in and by which he agreed to reconvey the same, but that
he wrongfully and refused to do this and converted the bonds to
his own use; that the note was still due and unpaid with interest.
An affidavit was attached to the statement of claim,
in which it was averred that there was due plaintiffs, after
allowing all just credits, etc., $2,062.
June 30, 1932, the defendant filed an appearance and
thereafter an affidavit of merits, which was later by agreement
stricken, and defendant entered in lieu an amended affidavit of
merits. Thereafter defendant for some of an affidavit
of merits was entered, and August 13, 1932, defendant filed a
late motion.

On the same date the court, as the bill of exceptions indicates without taking any evidence, found the defendant guilty of having wilfully, maliciously, tortiously and fraudulently converted to his own use ten bonds mentioned and described in the plaintiff's statement of claim, and found that the damage of the plaintiffs was the sum of $3082.50, and judgment was entered upon the finding for that amount, with further judgment "that the defendant have a capias ad satisfaciendum therefor." Also on the same date there was a motion to vacate the judgment entered, the hearing set for October 2, 1925, and on that date the judgment was by agreement vacated and set aside and the case re-instated and set for trial on November 25, 1925.

Thereafter, on motion of the plaintiff, it was ordered that the order of October 2, 1925, should be vacated and the motion therefore entered to vacate the judgment set for hearing on December 18, 1925. This motion was continued until December 23, 1925, at which time the motion to vacate the judgment was over-ruled; the abstract further indicates that at that time motions for a new trial and in arrest of judgment were made and over-ruled.

The bill of exceptions in this case is most informal and indeed the whole record unsatisfactory. The statement of claim does not, in our opinion, state a cause of action for the reason that it does not show the note of the defendant was originally made and the securities deposited upon any consideration for the same.

As the record now stands, it shows a judgment against the defendant for the whole amount of any indebtedness which could be due under the allegations of the statement of claim and leaves plaintiffs the holders of an unpaid note for the full amount thereof.

Notwithstanding the informality of the bill of ex-

ceptions, we think it further appears therefrom that the defendant was prevented from making a defense to the action by representations made to him by an agent of the plaintiffs. It is unnecessary to cite the well known cases which express the rules that should govern motions of this kind.

A motion to set aside a default is addressed to the sound discretion of the trial court, and the action of the trial court will not be reversed by the appellate tribunal unless the discretion appears to have been abused.

It is also ordinarily necessary that the defendant in such case should show diligence. Here the record does not show diligence, but it does, we think, show facts which excuse the failure to exercise it.

Courts exist for two reasons - first, that order may be maintained in the community, and second, that justice may be administered.

There is enough in this record, informal and defective as it is, to convince this court that defendant has a defense which he should have been allowed to present. The order is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

286 - 31106

MARGARET KLOSKY CONVERSE,
Appellee,

vs.

BALABAN & KATZ CORPORATION,
Appellant.

243 I.A. 602

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case upon trial before a jury a verdict was returned in favor of the plaintiff in the sum of $1,000, and the court, over-ruling motions of defendant for a new trial and in arrest, entered judgment for that amount.

The defendant argues the total failure of the evidence to support the judgment. This point is preserved by proper motions, and in view of the conclusion at which we have arrived it will be unnecessary to consider other errors assigned and argued.

The declaration alleged that the defendant owned and operated a theatre to which it invited the public, charging it for admission; that the plaintiff visited the theatre as a patron, occupied a seat on the main floor; that to the rear and above the seat she occupied there was a balcony occupied by other patrons, and that the defendant admitted to the theatre another patron who was assigned to a seat in the balcony; that this patron was demented, boisterous and disorderly and his presence dangerous to the safety of the lives of other persons in the theatre, of which the defendant should have known; that it was the duty of the defendant to take charge of such other person and have him removed from the theatre and not to allow him to remain unrestrained in the theatre; that defendant disregarded its duty in this respect and permitted this person to remain in the theatre unrestrained, while such person was in a dangerous and menacing attitude and apparently

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in a demented condition of mind; that by reason thereof the said other person precipitated himself down from the balcony, striking upon the plaintiff and injuring her.

The occurrence in question took place in the Chicago theatre on December 17, 1923. The evidence tends to show that the plaintiff was a patron of the theatre at that time, that she was accompanied by her sister, and that she was assigned to a seat on the main floor of the theatre. The accident occurred near the end of an exhibition of the picture known as "Reno" at the climax of the picture where two men were shown as grappling on the edge of what was supposed to be a geyser and one of them appeared to be sliding down into the seething waters. As was usual and necessary at such times, the theatre was darkened. The uncontradicted evidence also shows that the organ was being played at this particular time.

It is conceded that the patron who jumped over the balcony was insane. The evidence of numerous witnesses tends to show that from two to ten minutes prior to the time he leaped there was a sound in the theatre which some described as whistling, others as screeching, still others as wheezing and some as shouting. One of the witnesses states, however, that he at first supposed the unusual sound came from the organ, and that about seven or eight minutes after that time he heard a loud wailing or "yelling" which was kept up for about a minute and a half or two minutes.

The uncontradicted evidence also tends to show that the insane patron walked down the aisle, apparently for the purpose of leaving the theatre, and that as he walked he several times called out, "We are lost;" that he suddenly went over towards the balcony, when another patron, noticing what he was about to do, grabbed hold of him and attempted, unsuccessfully, to restrain him from leaping.

It has not been contended that there was any negligence in the construction of the theatre or in the manner in which it was conducted; but it is argued the ushers were negligent in failing to identify and remove the insane patron.

There does not seem to be any dispute as to the rule of law applicable to persons owning and conducting places of entertainment and amusement, such as theatres. It is conceded that their liability is not that of an insurer of the safety of their patrons, but that on the contrary they are required to use ordinary and reasonable care for the safety of those who upon their invitation have become their patrons. Hart v. Washington Park Club, 157 Ill. 9; Barton v. Renin County Agricultural Soc., 83 Wis. 19; Hecker v. Smith, 31 N. Y. Supp. 1067; Flanagan v. Goldberg, 132 N. Y. Supp. 205.

Applying this rule to the facts, the question is whether there is in the record any evidence from which a jury could reasonably find that the defendant was negligent, as alleged, in allowing this insane man to enter the theatre or in permitting him to remain there.

It has been held that the patrons of a motion picture theatre have the right to express by either applause or hisses the sensations which naturally present themselves. Clifford v. Brandon, 2 Campbell's Reports, 358; Gregory v. Duke of Brunswick, 1 Carrington and Kirkwan's Reports, 24, page 31.

While the conduct of this insane patron as shown by the evidence may have been somewhat unusual, there was nothing to indicate that he was insane or dangerous up to the time when he suddenly turned to the balcony and attempted to leap over it. The proprietor of a theatre could hardly be expected to anticipate the actions of patrons who may happen to be subnormal. The dark-

ness which was necessary in order that the picture might properly be shown would naturally tend to prevent the detection of mental abnormality in patrons who were present, and we conclude that there is no evidence in the record from which the jury could find that the defendant was guilty of the negligence alleged in the declaration. We therefore hold as a matter of law that the plaintiff is not entitled to recover, and the judgment is reversed.

REVERSED.

McBurely, P. J., and Johnston, J., concur.

345 - 30607

HENRY S. BLUM,

Appellee,

v.

PUBLIC LIFE INSURANCE COMPANY, a corp.,

Appellant.

243 I.A. 602

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit for fees for legal services alleged to have been rendered by the plaintiff, Henry S. Blum, to the defendant, Public Life Insurance Company. There was a trial before the court with a jury, and a verdict and judgment for the plaintiff in the sum of $3500.00. This appeal is therefrom.

The evidence tends to show the following: Henry S. Blum, a lawyer, and practicing under the name of Blum, Blum and Delaney, in October 1923, began negotiations with the Public Life Insurance Company (hereinafter called, the Insurance Company) in regard to the collection of an account which the Insurance Company had against the Public Agency Company.

Louis Narowetz was elected president of the Insurance Company on October 5, 1923. The executive committee of the Insurance Company was made up of Narowetz St. George, Welsch, Linder and Kuhn. Sometime in the early

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HENRY S. BLUM,

Appellee,

v.

PUBLIC LIFE INSURANCE COMPANY, a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

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The evidence tends to show the following: Henry S. Blum, a lawyer, and practicing under the name of Blum, Blum and Delaney, in October 1923, began negotiations with the Public Life Insurance Company (hereinafter called, the Insurance Company) in regard to the collection of an account which the Insurance Company had against the Public Agency Company.

Louis Marowetz was elected president of the Insurance Company on October 5, 1923. The executive committee of the Insurance Company was made up of Marowetz, George, Weiss, Lipper and Kuhn. Sometime in the early

part of October, 1923, St. George telephoned to the plaintiff and said to the latter, "I am going to, want you to file a petition in bankruptcy, I am going to send the claims over to you," and, further, asked the plaintiff what he would require by way of authority. The plaintiff then asked St.George what the claims were based on, and the latter said that they were based partly on notes, and partly on moneys due from the Public Agency Company. The plaintiff requested him to send the notes over. Accordingly, three notes, one for $100,000.00, one for $12,915.38,and one for $6,856.40, all signed by the Public Agency Company and payable to the Insurance Company, were sent to the plaintiff. Shortly before October 23, 1923, the plaintiff had another telephone conversation with St.George, in which he asked St. George how large the claim of the Insurance Company was, and was told it amounted to about $240,000.00; and after commenting on the unusual size of the claim and the danger of making it public, suggested that the notes be endorsed over to some one else, and, after being asked for the name of an endorsee, gave St. George the name of Gnadt, an employee of the plaintiff. The plaintiff sent the notes back and they were endorsed to Gnadt. The notes later were endorsed to one Cole, another employee of the plaintiff, because Gnadt was about to leave the plaintiff's employment.

Subsequently, on October 31, 1923, the plaintiff prepared and filed a bankruptcy petition, and an application for a receiver for the Public Agency Company, and from that time on until September 15, 1924, when the petition for adjudication was dismissed, rendered legal services in further-

part of October, 1852, St. George telephoned to the plain-
tiff and said to the latter, "I am going to, want you to
file a petition in bankruptcy; I am going to send the claims
over to you," and, further, asked the plaintiff what he would
require by way of security. The plaintiff then asked St.George
what the claims were based on, and the latter said that they
were based partly on notes, and partly on moneys due from the
Public Agency Company. The plaintiff requested him to send
the notes over. Accordingly, three notes, one for $100,000.00,
one for $12,915.35, and one for $6,886.40, all signed by the
Public Agency Company and payable to the Insurance Company,
were sent to the plaintiff. Shortly before October 25, 1852,
the plaintiff had another telephone conversation with St.George,
in which he asked St. George how large the claim of the Insurance
Company was, and was told it amounted to about $240,000.00;
and after commencing on the unusual size of the claim and
the danger of making it public, suggested that the notes be
endorsed over to some one else, and, after being asked for the
name of an endorsee, gave St. George the name of Gnadt, an
employee of the plaintiff. The plaintiff sent the notes back
and they were endorsed to Gnadt. The notes later were endorsed
to one Cole, another employee of the plaintiff, because Gnadt
was about to leave the plaintiff's employment.

Thereafter, on October 31, 1852, the plaintiff prepared and filed a bankruptcy petition, and an application for a receiver for the Public Agency Company, and from that time on until September 15, 1854, when the petition for adjudication was dismissed, rendered legal services in further

ance of those proceedings.

The following is an itemized list of the nature of the services, and the time spent:

1923		Hours
Oct. 30	Prepared petition for adjudication on petition for receiver conferred re matter	3
Oct. 31	Completed petitions - arranging for execution of same. Appeared before Judge Wilkerson. Order restraining bankrupt, order for special reference. Arranged for setting of matter before referee. Had subpoenaes issued.....	7
Nov. 1	Examination morning and afternoon.....	5
Nov. 2	Went over audit of Life Insurance Co. Conference with attorney for bankrupt at my office	2
Nov. 3	Conference with manager of public Life Insurance Co. at his office. Further Conference. Work on record.....	3
Nov. 5	Examination of answer filed in Superior Court conferences.....	2
Nov. 7	Appeared before Judge Wilkerson on application for receiver and motion to refer.....	2
Nov. 19	Conference with Jensen. Preparation.....	2
Nov. 20	Appearance before Referee Eastman.....	2
Nov. 20	Conference in forenoon.....	1
Nov. 21	Conferred with Auditors at Schuyler & Weinfield office.....	2
Nov. 23	Prepared intervening petitions. Had notices served.....	2
	Appeared before Referee Eastman.....	2
	Preparation.....	3
Nov. 24	Appeared before Referee Eastman. Trial of case and preparation of same.....	3
Nov. 26	Appearance before Referee Weaver and preparation.....	3
Nov. 27	Prepared notice in Schuyler, Ettleson & Weinfield office, Further consideration of the matter.....	2
Dec. 5	Conferred with Jensen, St. George and Hennessy.....	1
Dec. 10	Conferred with clients. Appeared before referee.....	4
Dec. 12	Trial of case morning and afternoon.....	7
	Preparation	
Dec. 13	Preparation.....	6
Dec. 14	Trial of case morning and afternoon. Preparation.....	8
		72

The following is an itemized list of the actions of
the servicing, and the time spent:

Item		
Oct. 22	Prepared petition for adjudging ca	
Oct. 23	petition for receiver entered on motion	x
	Completed petition - arranging for	
	execution of same. Arranging notice	
	Judge Gilmore. Order restricting	
	Debtors, order for special meeting.	
	Attended to administration matters before	
	referee. 3rd meeting creditors held.	7
Nov. 1	Examination continued afternoon.	5
Nov. 3	Conference with manager of Pacific Life	
	Insurance Co. at his office. Further	
	conference. Work on report.	5
Nov. 4	Examination of answer filed in Superior	
	Court matter.	5
Nov. 7	Appeared before Judge Gilmore on Appli-	
	cation for receiver and motion to refer.	5
Nov. 10	Conference with Judge Trapnell.	5
Nov. 20	Attended before Referee Eastman.	5
Nov. 21	Conference in forenoon.	1
Nov. 22	Conference with Auditors at Dunkley & Wain-	
	wright office.	5
Nov. 27	Preparing interesting petitions. Had notices	
	served.	5
	Appeared before Referee Eastman.	5
	Examination.	5
Nov. 30	Appeared before Eastman. Trial of	
	case and presentation of same.	1
Dec. 10	Appearance before Referee Hunter and pre-	
	paration.	5
Dec. 17	Prepared notice in Dunkley, Wainwright &	
	Whitfield office. Further consideration	
	of the matter.	1
Dec. 8	Conferred with Jensen, St. George and	
Dec. 19	Conferred with clients. Appeared before	
	referee.	4
Dec. 18	Trial of case morning and afternoon.	7
Dec. 18	Preparation.	6
Dec. 14	Trial of case morning and afternoon.	
	Preparation.	8

1923		Hours
Forward.....		72
Dec. 15	Conferences. Examination of records...	3½
Dec. 18	Hearing before referee morning and afternoon going over record-preparation of case.....	6
Dec. 19	Trial of case and preparation.....	9
Dec. 21	Trial of case and preparation.....	8
Dec. 22	Preparation of case	2
Dec. 27	Preparation of case. Conference with accountant. Abstracting record.....	7
	Trial of case all afternoon and all forenoon; also preparation.....	7
Dec. 28	Trial morning and afternoon, &evening 10 a.m. to 11 P.M.....	13
Dec. 28	Preparation and argument.....	5
Dec. 31	Preparation.....	1
Dec. 11	Trial before Referee Eastman morning and afternoon. Preparation.....	6
1924.		
Jan. 7	Conference with Weinfeld. Consideration of matter.....	1
Jan. 8	Conference on matter.....	1½
Jan. 10	Conference in matter. Preparation.....	1
Jan. 13	Appearance before referee in opposition to motion to vatate order. Argued same. Examining intervening petition. Also Sunday, January 13th.....	4
Jan. 14	Appeared before Wilkerson on motion to approve referee's report, and for appointment of receiver.....	3
Jan. 15	Conference regarding hearing before Judge Wilkerson.....	1
Jan. 18	Preparation.....	2
Jan. 19	Preparation.....	1½
Jan. 20	Sunday. Preparation for argument before Judge Wilkerson.....	2
Jan. 21	Argument morning and afternoon before Judge Wilkerson.....	4
Jan. 24	Going over brief. Dictating reply thereto to 8 P.M.....	5
Jan. 25	Conference and preparation of reply to respondents' argument.....	5
Jan. 26	Concluding preparation of brief and revision thereof.....	3
Feb. 1	Appeared be fore Judge Wilkerson afternoon conference.....	1½
		95

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Foreword..... 13
Dec. 11 Confirmation. Examination of records... 14
Dec. 12 Dealing before referee meeting and after-
noon going over record-preparation of
case..... 8
Dec. 13 Trial of case and preparation..... 9
Dec. 21 Trial of case and preparation..... 9
Dec. 22 Preparation of case 8
Dec. 27 Preparation of case. Conference with
partner. Starting record..... 7
Trial of case all afternoon and all
forenoon; also preparation..... 7
Dec. 29 Final meeting and argument, forenoon
12 a.m. to 11 P.M..... 12
Dec. 30 Preparation and argument..... 8
Dec. 31 Preparation..... 1
Dec. 11 Trial before referee hearing argument and
testimony. Preparation..... 6

1934.

Jan. 7 Conference with Mr.Ed. Omaljanovich
of Warren..... 1
Jan. 8 Conference on matter..... 1/4
Jan. 10 Conference in matter. Preparation..... 1
Jan. 12 Conférence relative à la question
de mettre en vente ordre. Legal view,
financial interesting petition. Une
partie, Janvier 12e..... 4
Jan. 14 Appeared before Citizens to settle to
advance referee's report, and for adjust-
ment of matter..... 4
Jan. 15 Conference regarding hearing before Judge
Clarkson..... 1
Jan. 17 Preparation..... 2
Jan. 18 Preparation..... 1/4
Jan. 20 Study. Preparation for arguments before
Judge Tillman..... 2
Jan. 21 Preparing matter and attending before
Judge Tillman..... 4
Jan. 24 Doing other mine. Objecting reply thereto
to 8 P.M..... 8
Jan. 25 Conference and preparation of reply to
respondents argument..... 8
Jan. 26 Completing preparation of brief and
revising brief..... 5
Feb. 1 Appearing in the Judge Wilkerson proceedings
matter..... 1/4

1924		Hours
Forward.....		95
Jan. 31	Appeared before Judge Wilkerson afternoon conference.....	1½
Feb. 5	Conference regarding exhibits.....	1
Feb. 14	Conference with St. George and Narowetz and preparing petition.....	1
Feb. 19	Appeared before Judge Wilkerson.....	1
Apr. 16	Conference re matter.....	2
Apr. 17	Appeared before Judge Wilkerson.....	1
Apr. 22	Appeared before Judge Wilkerson, conference and preparation.....	1
Apr. 23	Preparation.....	1
May 5	Appeared before Judge Wilkerson on motion to adjudicate.....	1½
May 26	Conferences. Appearance before Judge Wilkerson.....	3
June 17	Appearance before Judge Wilkerson, matter set to June 30th.....	1
June 28	Preparation.....	1½
June 30	Appeared before Judge Wilkerson.....	6
July 2	Preparation.....	1
July 8	Preparation.....	½
July 9	Conference.....	1
July 12	Conference.....	1½
July 28	Appeared before Judge Wilkerson and briefed matter.....	1½
Aug. 2	Appeared before Judge Wilkerson.....	1½
Sept. 2	Conference.....	1
		196½

The items in the account, and which were recited in the statement of claim, were from the books of the plaintiff which were regularly kept by him, or under his supervision, in the course of his practice. On November 3, after filing the petition for the bankruptcy of the Public Agency Company, and appearing before Judge Wilkerson, and a day's examination before a referee, he conferred with the directors of the Insurance Company at its office. At that conference, of the directors, there were present St. George, Narowetz, and probably Kuhn, Linder and Welsch. The plaintiff told them that if the figures of one Clover, the President of the Public Agency Company - whom the plaintiff had examined before the referee, were true, they would indicate that the company was solvent. St. George and Narowetz said Clover's

1924		Hours
Forward		35
Jan. 21	Appeared before Judge Wilkerson at Terre	1½
Feb. 8	Conference regarding exhibits	1
Feb. 14	Conference with Mr. Cooper and Meromete and preparing petition	1
Feb. 19	Appeared before Judge Wilkerson	1
Mar. 10	Conference re matter	½
Mar. 17	Appeared before Judge Wilkerson	1
Apr. 21	Appeared before Judge Wilkerson, conference and preparation	1
Apr. 23	Preparation	1
May 2	Appeared before Judge Wilkerson on motion to adjourn case	1½
May 28	Conference. Appeared before Judge Wilkerson	3
June 17	Appeared before Judge Wilkerson, retainer set to June 24th	1
June 23	Preparation	1½
June 30	Appeared before Judge Wilkerson	½
July 2	Preparation	1
July 3	Preparation	½
July 9	Conference	1
July 12	Conference	1½
July 25	Appeared before Judge Wilkerson and related matter	1½
Aug. 2	Appeared before Judge Wilkerson	1½
Sept. 8	Conference	1
		75½

The items in the account, and which were recited in the statement of claim, were from the books of the plaintiff which were regularly kept by him, or under his supervision, in the course of his practice. On November 3, after filing the petition for the bankruptcy of the Public Agency Company, and appearing before Judge Wilkerson, and a day's examination before a referee, he conferred with the directors of the Insurance Company at its office. At that conference, of the directors, there were present St. George, Meromete, and probably Kuhn, Fisher and Nelson. The plaintiff told them that if the figures of one Glover, the President of the Public Agency Company - upon the plaintiff had examined before the referee, were true, they would indicate that the company was solvent. St. George and Meromete said Glover's

figures were wrong and that the company was insolvent, and unless something were done quickly the remaining assets would disappear. The plaintiff then told them that what they said might be true, but, as there was going to be a contest, he ought to have some arrangement for fees, or he would not be able to go on. Narowetz or St. George then told him that they (meaning the Insurance Company) would guarantee him $1,000.00, and the plaintiff told them that was all right. In one conversation he was told that he would get a minimum fee of $1,000.00.

Subsequent to that time, the plaintiff had a number of conversations with St. George in regard to his fees, in the course of which he told St. George that he could not go on with the case unless he was paid some fees; that St. George asked him not to withdraw, that the Insurance Company would pay him; that Narowetz told him on one occasion that if he would continue in the case he would pay him $1,000.00 out of his own pocket. On January 14, 1924, Narowetz gave the plaintiff a writing in which he stated that "if the Public Life Insurance Company does not pay you an additional thousand dollars for services rendered in connection with these proceedings, I will do so. This agreement is without prejudice to your right to obtain any additional compensation that you can out of the Public Agency Company."

The testimony of the plaintiff is that he had practiced law for nineteen years in Cook County, and was familiar with proceedings in bankruptcy; that in the bankruptcy proceeding in question he represented the defendant as a creditor in an amount in excess of $119,000; prepared a petition for adjudica-

amount in excess of $175,000; preferred a petition for adjudica-
tion of insolvency; that in the bankruptcy proceeding
in question he represented the defendant as a creditor in an
involuntary proceeding in bankruptcy; that in the bankruptcy proceeding
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the practice of the Public Agency Company."

The testimony of the plaintiff is that he had previously
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tion; appeared in court for the appointment of a receiver; had a special reference obtained; appeared in that special reference, spending 130½ hours in court and before the referee, and 66 hours in his office, and that a reasonable charge for such services would be $7500.00; that the minimum per diem is $200.00 for work in court and $100.00 for office work; that those are the usual and ordinary charges in this county in bankruptcy proceddings, and based upon the schedule promulgated by the Illinois Bar Association.

Quite obviously the evidence for the plaintiff, a brief summary of which is above set forth, makes out by itself a cause of action. It is contended, however, that the evidence, including not only that for the plaintiff, but, also, that for the defendant, shows that the verdict of the jury for $3500.00, was clearly against the weight of the evidence. It is claimed that the Insurance Company passed a resolution providing that it would pay the plaintiff $1,000.00 in case of a final adjudication of the bankruptcy of the Public Service Company, and that the plaintiff was so informed, and that, as the Public Service Company was not adjudicated a bankrupt, nothing was due the plaintiff for legal services. It would enlarge this opinion too much to set forth even a summary of the testimony on that subject. There is no doubt but that the plaintiff rendered the legal services set forth in the itemized statement, whether he agreed that he should be paid $1,000.00 therefor, and only in case of a finding of bankruptcy, was a question of fact for the jury. In the affidavit of merits the defendant denied not only that it was never at any time a petitioner in the bankruptcy proceedings, but that the plaintiff ever performed any professional services for the defend-

tiff ever be allowed any professional services for the defendant in the bankruptcy proceedings, but that the plaintiff rendered the legal services set forth in the itemized statement, whether he agreed that he should be paid $1,000.00 therefor, and did in fact for the jury. In the affidavit of merits the defendant denied not only that it was ever at any time a debtor, and only in case of a finding of bankruptcy was a testimony on that subject. There is no doubt but that the evidence in this opinion too much to set forth even a summary of the nothing was due the plaintiff for legal services. It would appear that the Public Service Company was not adjudicated a bankrupt, and that the plaintiff was no informed, and that, as final adjudication of the bankruptcy of the Public Service Company, the plaintiff would be entitled to $1,000.00 in case of a finding that it would pay the plaintiff $1,000.00 in case of a finding that the Insurance Company passed a resolution providing $5000.00, was clearly against the weight of the evidence. It for the defendant, shows that the verdict of the jury for the defendant not only that for the plaintiff, but, also, that a cause of action. It is contended, however, that the evidence prior summary of which is above set forth, makes out by itself

Quite obviously the evidence for the plaintiff, as pronounced by the Illinois Bar Association.

county in bankruptcy proceedings, and based upon the schedule work; that those are the usual and ordinary charges in this per diem is $500.00 for work in court and $100.00 for office charge for such services would be $1500.00; that the minimum fore, and 60 hours in his office, and that a reasonable reference, spending 150 hours in court and before the reper a special reference obtained; appeared in that special tion appeared in court for the appointment of a receiver;

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Quite obviously the evidence for the plaintiff, a brief summary of which is above set forth, makes out by itself a cause of action. It is contended, however, that the evidence, including not only that for the plaintiff, but, also, that for the defendant, shows that the verdict of the jury for $3500.00, was clearly against the weight of the evidence. It is claimed that the Insurance Company passed a resolution providing that it would pay the plaintiff $1,000.00 in case of a final adjudication of the bankruptcy of the Public Service Company, and that the plaintiff was so informed, and that, as the Public Service Company was not adjudicated a bankrupt, nothing was due the plaintiff for legal services. It would enlarge this opinion too much to set forth even a summary of the testimony on that subject. There is no doubt but that the plaintiff rendered the legal services set forth in the itemized statement, whether he agreed that he should be paid $1,000.00 therefor, and only in case of a finding of bankruptcy, was a question of fact for the jury. In the affidavit of merits the defendant denied not only that it was never at any time a petitioner in the bankruptcy proceedings, but that the plaintiff ever performed any professional services for the defend-

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ree a special reference obtained; engaged in that special
tion; appeared in court for the appointment of a receiver;

ant in any proceedings or litigation, and denied that it ever requested him to perform professional services in any matter in which it was a party or in which the Public Life Insurance Company was interested, and, yet, upon the trial, the defendant offered in evidence a resolution of the Executive Committee of the defendant "guaranteeing to Blum, Blum & Delaney, attorneys, a munimum fee of $1,000.00 upon the adjudication in bankruptcy of the Public Agency Company; and costs and expenses." Certainly, the evidence on the subject of employment is in conflict, and such being the case, and the jury having had the advantage of considering the testimony as it was given, we do not feel justified in overriding their verdict.

It is urged for the plaintiff that the defense that there was an express contract which provided that payment should only be made if the Public Service Company was adjudicated a bankrupt, could not be considered, because it was not set up in the affidavit of merits, but, as the affidavit of merits, taken as a whole, denied that the plaintiff was employed by any one having authority to hire him, and denied that he performed the services, and denied the reasonable value of his services, and denied that the proceedings in bankruptcy were instituted in its name, or on its behalf, and as there was a trial upon the merits, which gives rise to the question whether the contract of employment was contingent or not, and as considerable evidence was introduced upon that subject, it is our judgment that this contention is not tenable.

It is alleged, for the defendant, that the plaintiff failed to prove that he, individually, rendered services at the

failed to prove that he, individually, rendered services at the
request of Mr. and as considerable evidence was introduced upon that
subject, it is our judgment that this contention is not tenable.

It is alleged, for the defendant, that the plaintiff
was not employed by any one having authority to hire him, and
that in any proceedings or litigation, and denied that it
ever requested him to perform professional services in
any matter in which it was a party or in which the Public
Life Insurance Company was interested, and, that upon the
trial, the defendant offered in evidence a resolution of the
Executive Committee of the defendant "guaranteeing to Blum,
Blum & Delaney, attorneys, a minimum fee of $1,000.00 upon
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in bankruptcy were instituted in its name, or on its behalf,
and as there was a trial upon the merits, which gives rise to

special instance and request of the defendant, and was entitled to recover for the same on the quantum meruit.

According to the testimony of the plaintiff, negotiations for his employment began when St. George, one of the Executive Committee of the defendant, called him up on the telephone and told him that he was going to send some claims over and would require the plaintiff to file a petition in bankruptcy. The legal services rendered by the plaintiff began at that time. It is true the plaintiff testified as follows: "Mr. Delaney, and my brother share only fees in such matters that I turn over to the firm of Blum, Blum & Delaney. Under my arrangements I practice law by myself." He,also, testified, however, that he prepared the petition to adjudicate, and prepared the application for a receiver, and that the legal services that were rendered were rendered by him. Although such an arrangement with his brother and Delaney may be exceptional and anomalous, if this particular matter was not turned over to the firm, then under the arrangement, his brother and Delaney would not be entitled to share in the fees, and the plaintiff being the only interested party was the only one entitled to bring suit. That the name of Blum, Blum & Delaney was used in some of the papers, as for example, in the application for bankruptcy, would make no difference to the defendant, unless the defendant saw fit to show by evidence that it had retained all the members of that firm, and had failed to receive the services to which it was entitled.

It is contended for the defendant that the court erred in giving the fifth instruction. If the jury believed from the evidence that the plaintiff was employed by the defendant to render the services set forth in the plaintiff's

special instances and request of the defendant, and was entitled to recover for the same on the quantum meruit.

According to the testimony of the plaintiff, negotiations for his employment began when Mr. George, one of the Executive Committee of the defendant, called him up on the telephone and told him that he was going to send some of him over and would require the plaintiff to file a petition in bankruptcy. The legal services rendered by the plaintiff began at that time. It is true the plaintiff testified as follows: "Mr. Delaney, and my brother above only fees in such matters that I turn over to the firm of Blum, Blum & Delaney. Under my arrangements I practice law by myself." He also testified, however, that he prepared the petition to adjudicate, and prepared the application for a receiver, and that the legal services that were rendered were rendered by him. Although such arrangements with his brother and Delaney may be exceptional and anomalous, if this particular matter was not turned over to the firm, then under the arrangement, his brother and Delaney would not be entitled to share in the fees, and the plaintiff being the only interested party was the only one entitled to bring suit. That the name of Blum, Blum & Delaney was used in some of the papers, as for example, in the application for bankruptcy, would make no difference to the defendant, unless the defendant saw fit to show by evidence that it had retained all the members of that firm, and had failed to receive the services to which it was entitled.

It is contended for the defendant that the court erred in giving the fifth instruction. If the jury believed from the evidence that the plaintiff was employed by the defendant to render the services set forth in the plaintiff's

statement of claim, that he did render them at the request of the defendant, then it was proper that the jury should be instructed to find against the defendant. Counsel urge that the instruction was erroneous because it assumed that the employment was of the plaintiff individually. That assumption, however, is not made. There was evidence as to the employment of the plaintiff individually. He testified that he was called up at the outset by one of the members of the Executive Committee, and that their negotiations began in that way, and, further, that he did the work himself, and that his arrangements with his associates, Blum and Delaney, were such that the fees, if earned, belonged to him. That being the situation, we think the instruction was entirely proper.

It is also urged that this instruction ignores the employment of the plaintiff upon any basis except a quantum meruit; and, also, because there was no competent evidence that the charges were what are customary for such legal services. The plaintiff's case was based solely on a quantum meruit, and not upon an express contract, and it was, therefore, entirely proper for the jury to be instructed as it was on that subject. As to that part of the instruction pertaining to the charges being reasonable and customary, there is evidence not only as to the reasonable amount for all services, but as to the reasonable charges per diem.

It is also claimed that the court erred in refusing to give two instructions which were offered by the defendant, and erred in refusing to submit to the jury two special findings which were requested by the defendant. Those matters, however, are not mentioned in the argument, and we shall, there-

however, are not mentioned in the argument, and we shall, therefore, not consider them. Those matters which were requested by the defendant. Those matters and erred in refusing to submit to the jury two special findings to give two instructions which were offered by the defendant, namely:

It is also claimed that the court erred in refusing to give the following instruction: "The jury are instructed that the plaintiff is not entitled to recover in this action for any services, but we do think the evidence in this case sufficient to warrant the jury in finding that the plaintiff rendered services to the defendant company, and that the jury should allow the plaintiff a reasonable compensation for such services, and in determining the amount of such reasonable compensation the jury should take into consideration the evidence in this case as to the reasonable value of such services rendered by the plaintiff to the defendant company, if any, and the jury should allow the plaintiff such reasonable compensation for such services as they may find from the evidence in this case, not exceeding the amount claimed in the plaintiff's petition." This instruction was refused by the court, and the defendant excepted. It is also claimed that the court erred in refusing to give the following instruction: "The jury are instructed that the plaintiff is not entitled to recover in this action for any services rendered by him to the defendant company, unless you find from the evidence that the plaintiff rendered such services with the intention of charging therefor, and that the defendant company accepted such services with the understanding that the plaintiff was to be paid therefor, and

fore, consider them as waived. Rule 19 of the Rules of Practice of this Court.

It is, also, urged for the defendant, that, as the verdict was considerably less than the ad damnum, it ought not to stand, that it was evidently based upon a misapprehension or was the result of prejudice. There was evidence as to the time spent and work done, evidence as to the reasonable value of all that was done, and evidence as to the reasonable charges per diem. Just how the jury made its computation, we do not, nor is it necessary that we should, know. As the claim was on a quantum meruit and not on an express contract fixing a definite sum, as, for example, on a promissory note, and as the verdict was for less than the claim, we do not feel that we are entitled to set it aside.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

O'DONNOR, J. AND THOMSON, J. DISSENT.

APPEAL ALLOWED.

Finding no error in the record, the judgment will be affirmed.

the claim, we do not feel that we are entitled to set it aside.

on a promissory note, and as the verdict was for less than entered contract finding a definite sum, as, for example, know. As the claim was on a quantum meruit and not on an computation, we do not, nor is it necessary that we should, reasonable charges per diem. Just how the jury made its reasonable value of all that was done, and evidence as to the done as to the time spent and work done, evidence as to the apprehension or was the result of conjecture. There was evidence enough not to stand, that it was evidently based upon a mis- the verdict was considerably less than the ad damnum, it

It is, also, urged for the defendant, that, as

Practice of this Court,

ford, consider them as waived. Rule 19 of the Rules of

2M 2-4-25

No. 33521

General Automotive Manufacturing Company, appellant, v. Harvey S. Pardee, appellee. Gen. No. 30,688.

243 I.A. 602

Action for money had and received. Judgment for defendant.

Error to the Municipal Court of Chicago;
Superior Court of Cook county;
Appeal from the Circuit Court of county;
County Court of county;
the Hon. , Judge, presiding. Heard
in the Branch Appellate Court
this court at the term,
Affirmed
Reversed
Reversed and remanded with directions.

Opinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

PRESIDING JUSTICE delivered the opinion of the court.

aside.

finding no error in the record, the judgment will
be affirmed.

30688

243 I.A. 602

GENERAL AUTOMOTIVE MANUFACTURING COMPANY, a corporation,

APPELLANT,

vs.

HARVEY S. PARDEE,

APPELLEE.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the plaintiff, the General Automotive Manufacturing Company, from a judgment entered in favor of the defendant, Harvey S. Pardee, as to certain claims made by the plaintiff, and in favor of the defendant, in the sum of $2600.00, on a set-off.

The plaintiff was incorporated on March 1, 1924. The stock was subscribed for as follows: Miller & Pardee, Inc., 4997 shares; the Pardees and McIlroy, one share, each. The first meeting of the board of directors, composed of the two Pardees, and McIlroy, was held on March 14, 1924. Harvey S. Pardee was elected chairman of the board; Dewire, President; Charles A. Pardee and one Colberg, Vice-presidents; Kingsley, treasurer; and McIlroy, Secretary. No express provision as to salaries was made until June 14, 1924, when a special meeting was held. At that meeting it was voted, on motion of McIlroy, seconded by Charles A. Pardee, "that salaries be paid for the year 1924, beginning as of January 1, 1924, as follows: Harvey S. Pardee, $400.00 a month, Charles A. Pardee, $250.00 a month." Between January 1 and June 14, 1924,

Opinion filed Oct. 13, 1938.

MR. JUSTICE DUNCAN delivered the opinion of the court.

This is an appeal by the plaintiff, the General Automotive Manufacturing Company, from a judgment entered in favor of the defendant, Harvey S. Purdee, on his counterclaim made by the plaintiff, and in favor of the defendant, in the sum of $3800.00, on a set-off.

The plaintiff was incorporated on March 11 1926. The stock was subscribed for as follows: Miller & Purdee, Inc., 6997 shares; the Purdees and Hickory, one share, each. The first meeting of the board of directors, composed of the two Purdees, and Hickory, was held on March 14, 1926. Harvey S. Purdee was elected chairman of the board; Harvey Pennington; Charles V. Purdee was vice-president; Kingsley, treasurer; and Hickory, secretary. No express provision as to salaries was made until June 14, 1926, when a special meeting was held. At that meeting it was voted, on motion of Hickory, seconded by Charles V. Purdee, "that salaries be paid for the year 1926, beginning as of January 1, 1926," as follows: Harvey S. Purdee, $400.00 a month; Charles V. Purdee, $300.00 a month," between January 1 and June 14, 1926;

Harvey S. Pardee was paid $1,966.33, and Charles A. Pardee, $1843.33.

For the reasons we have set forth at length in the opinions this day filed in Case Nos. 30691 and 30693, we are of the opinion that the amounts paid in salaries to Harvey S. Pardee and to Charles A. Pardee by the plaintiff company in 1924, pursuant to the terms of the resolution of June 14 of that year, were wholly unwarranted, and the plaintiff is entitled to a judgment against the defendant, Harvey S . Pardee, in the instant case, in the sum of $1,966.33.

As to the set-off of the defendant, in our judgment, the resolution of June 14, 1924, as to salary for the rest of the year, may not be availed of. We have given our reasons in the opinion in Miller & Pardee, Inc., v. Harvey S. Pardee, General Number 30691, which opinion is adopted, in so far as it is apt, as part of this.

For these reasons, the judgment in the instant case will be reversed, with a finding of fact, and judgment entered in this court in favor of the plaintiff and against the defendant in the sum of $1966.33.

REVERSED WITH A FINDING OF FACT AND JUDGMENT HERE.

O'CONNOR, J. AND THOMSON, J. CONCUR.

FINDING OF FACT: We find as a fact that Harvey S. Pardee was overpaid in salary in the year 1924 to the extent of $1966.33.

No. 5558-1

2M 2-4-25

General Automotive Manufacturing Company, appellant, v. Charles A. Pardee, appellee. Gen. No. 30,689.

243 I.A. 602

Action for money had and received. Judgment for defendant.

Error to the Municipal Court of Chicago;
Superior Court of Cook county;
Appeal from the Circuit Court of county;
County Court of county;

the Hon. , Judge, presiding. Heard

in the Branch Appellate Court

this court at the term,

Affirmed
Reversed
Reversed and remanded with directions.

Opinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

PRESIDING JUSTICE delivered the opinion of the court.

30689

GENERAL AUTOMOTIVE MANUFACTURING COMPANY, a corporation,

APPELLANT,

vs.

CHARLES A. PARDEE,

APPELLEE.

APPEAL FROM MUNICIPAL COURT OF CHICAGO

243 I.A. 602

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the plaintiff, the General Automotive Manufacturing Company, from a judgment entered in favor of the defendant, Charles A. Pardee, as to certain claims made by the plaintiff; and in favor of the defendant. As a matter of convenience and to avoid repetition, an opinion this day filed in Miller & Pardee, Inc. v. Harvey S. Pardee (General Number 30691), and an opinion in General Automotive Manufacturing Company v. Harvey S. Pardee, General Number 30688), in so far as they are apt, are here adopted.

For the reasons set forth at length in the opinions referred to, we are of the opinion that Charles A. Pardee was not entitled to receive any salary from the plaintiff in the year 1924, under the resolution of June 14 of that year, and, therefore, the plaintiff was entitled to recover back from him the amount so paid, which was $1643.33. Further, in accordance with the reasoning expressed in the

4314. 602

Opinion filed Oct. 13, 1886.

above mentioned opinions, we hold, as a matter of law, that the defendant is not entitled to his alleged counterclaim, or set-off, as allowed in the trial court.

The judgment of the trial court will, therefore, be reversed, with a finding of fact, and judgment will be entered in this court in favor of the plaintiff and against the defendant in the sum of $1643.33.

REVERSED WITH A FINDING OF FACT AND JUDGMENT HERE.

O'CONNOR, J. AND THOMSON, J. CONCUR.

FINDING OF FACT: We find as a fact that Charles A. Pardee was overpaid in salary by the plaintiff company in the year 1924, in the sum of $1643.33.

o.55[illegible]

eneral Automotive Corporation, appellant, v. Charles A. Pardee,
appellee. Gen. No. 30,692.

243 I.A. 602

Action for money had and received. Judgment for defendant.

rror to the Municipal Court of Chicago;
Superior Court of Cook county;
ppeal from the Circuit Court of county;
County Court of county;
he Hon. , Judge, presiding. Heard
n the Branch Appellate Court
this court at the term,
Affirmed
Reversed
Reversed and remanded with directions.
Opinion fil Rehearing denied
for appellants.
for plaintiffs in error.
for appellees.
for defendants in error.
delivered the opinion of the court.

PRESIDING JUSTICE

30692

GENERAL AUTOMOTIVE CORPORATION, a Corporation,
APPELLANT,

vs.

CHARLES A. PARDEE,
APPELLEE.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

243 I.A. 602

Opinion filed Oct. 13, 1938.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the plaintiff, the General Automotive Corporation, from a judgment entered in favor of the defendant, Charles A. Pardee, in the sum of $4937.50 on a set-off.

Adopting here, as we do, the opinions in Miller & Pardee, Inc. v. Harvey S. Pardee, General Number 30688, and Miller & Pardee, Inc. v. Harvey S. Pardee, General Number 30691, and General Automotive Corporation, v. Harvey S. Pardee, General Number 30693, it becomes unnecessary to set forth in full our reasons in this particular opinion, for the conclusions we have reached, both in regard to the claims of the plaintiff for the various amounts of salary alleged to have been improperly paid to the defendant, and as to the counterclaim of the defendant.

The evidence shows that it was admitted by the defendant that he owed the plaintiff $236.88 for certain miscellaneous items which it had paid out for him. For the reasons we have given in the course of the opinion filed this day in Case No. 30693, we are of the opinion

ORDER

CHEMICAL AUTOMOTIVE CORPORATION,
a Corporation,

Appellant,

vs.

CHARLES V. PARDEE,

Appellee.

} APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

24314. 602

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the plaintiff, the Chemical Automotive Corporation, from a judgment entered in favor of the defendant, Charles V. Pardee, in the sum of $4217.80 on a set-off.

Arguing here, as we do, the opinions in Miller & Pardee, Inc. v. Harvey E. Pardee, General Number 30888, and Miller & Pardee, Inc. v. Harvey E. Pardee, General Number 30891, and General Automotive Corporation, v. Harvey E. Pardee, General Number 30892, it becomes unnecessary to set forth in full our reasons in this particular opinion, for the conclusions we have reached, both in regard to the claims of the plaintiff for the various amounts of money alleged to have been improperly paid to the defendant, and as to the counterclaim of the defendant.

The evidence shows that it was admitted by the defendant that he owed the plaintiff $3838.88 for certain miscellaneous items which it had paid out for him. For the reasons we have given in the course of the opinion filed this day in Case No. 30888, we are of the opinion

that the defendant, Charles A. Pardee was overpaid in salary for the year 1923, in the sum of $10,238.50, and for the year 1924, the sum of $3,616.00, or an aggregate amount of $13,852.50, which latter amount the plaintiff was entitled to recover back from him, and as to the counterclaim of the defendant, we do not agree with the trial judge as to the principle of law applicable to the facts, for the reasons also set out at length in the opinion above referred to, and we hold that the trial court erred as a matter of law in the finding made as to the defendant's counterclaim.

For these reasons, the judgment of the trial court will be reversed, and as the issues were submitted to the trial court without a jury, the judgment of the court will be reversed, with a finding of fact, and judgment will be entered here in favor of the plaintiff and against the defendant in the sum of $14,089.38.

REVERSED WITH A FINDING OF FACT AND JUDGMENT HERE.

O'CONNOR, J. AND THOMSON, J. CONCUR.

FINDING OF FACT: We find as a fact that the defendant, Charles A. Pardee, was overpaid in salary in the year 1923, the sum of $10,238.50, and in the year 1924, the sum of $3,616.00, and that the plaintiff paid out the sum of $238.88 for the personal use of the defendant.

No. 55621 55607

2M 2-4-25

General Automotive Corporation, appellant, v. Harvey S. Pardee, appellee. Gen. No. 30,693.

243 I.A. 602

Action for money had and received. Judgment for defendant.

rror to the Municipal Court of Chicago;
Superior Court of Cook county;
ppeal from the Circuit Court of county;
County Court of county;

ie Hon. , Judge, presiding. Heard

the Branch Appellate Court

this court at the term,

ffirmed
eversed
eversed and remanded with directions.

pinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

RESIDING JUSTICE delivered the opinion of the court.

30693

243 I.A. 602

GENERAL AUTOMOTIVE CORPORATION, a corporation,

APPELLANT,

vs.

HARVEY S. PARDEE,

APPELLEE.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct.13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the plaintiff, the General Automotive Corporation, from a judgment entered in favor of the defendant, Harvey S. Pardee, in the sum of $7180.00.

We have this day filed an opinion in Miller & Pardee, Inc. v. Harvey S. Pardee (General Number 30691), in which case we considered many of the matters of evidence and of law in issue in this case, and for convenience here adopt that opinion in so far as it is apt in this case.

The statement of claim alleges that Harvey S. Pardee was overpaid, in salary, $16,126.83 in 1922; $302.75, in 1923; and $4,545.37, from April 26 to June 14, 1924; in all $20,976.95; and that he is chargeable, in addition, for certain miscellaneous items, with the sum of $781.08. The defendant in his affidavit of merits denies that he owes any of the amounts stated in the statement of claim; and sets up a counterclaim to the effect that he was employed by the plaintiff in the year 1924 at a salary of $16,800.00; that he has been paid only $6883.19, and there is due him, against the plaintiff on its claim, and in favor of the

2431.A. 602

Opinion filed Oct.15, 1926.

MR. MUNICIPAL JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the plaintiff, the General Automotive Corporation, from a judgment entered in favor of the defendant, Harvey D. Parker, in the sum of $1382.00.

We have this day filed an opinion in Miller & Parker, Inc. v. Harvey D. Parker (General Number 30091), in which case we considered many of the matters of evidence and of law in issue in this case, and the conclusions here adopt that opinion in so far as it is apt in this case.

The statement of claim alleges that Harvey D. Parker was overpaid, in salary, $12,726.82 in 1925; $1925.75, in 1923; and $6,868.37, from April 26 to June 14, 1924; in all $20,520.94; and that he is chargeable, in addition, for certain miscellaneous items, with the sum of $981.06. The defendant in his affidavit of merits denies that he owes any of the amounts stated in the statement of claim; and sets up a counterclaim to the effect that he was employed by the plaintiff in the year 1924 at a salary of $10,000.00; that he has been paid only $8888.75, and there is due him,

defendant on its counterclaim for salary unpaid from June 14, to December 31, 1924, the sum of $7120.00.

The defendant was incorporated on June 1, 1921. The Pardees were directors from June 21, 1921 to June 14, 1924. The first meeting was held on June 4, 1921, and Harvey S. Pardee became President, and Charles A. Pardee, Vice-President, and Treasurer. On December 9, 1922, the Board of Directors voted that salaries for the President and Treasurer for the year 1922 be fixed and paid as follows, to Harvey S. Pardee, President, $17,163.33; to Charles A. Pardee, Treasurer, $10,893.33. From the minutes of the meeting of the directors held on January 13, 1923, it appears that it was voted that the salary of Harvey S. Pardee as President for the year 1923 was fixed at $8,500.00 and that of Charles A. Pardee, as Treasurer, at $5,840.00. On February 2, 1923, the finance committee voted that the salaries of the President and Treasurer of the defendant, the General Automotive Corporation and Miller & Pardee, Inc., should be "fixed at the sum of $25,000.00 a year for the two corporations combined from the date of the incorporation of the General Automotive Corporation, June 1, 1921, up to and including December 31, 1923, and that the amount to be paid by each corporation be determined and adjusted as soon as practicable."

On March 10, 1924, Harvey S. Pardee resigned as President, and Charles A. Pardee resigned as Treasurer. On April 26, 1924, the directors voted that salaries be paid during 1924, to the officers, as follows: Chairman of the Board, Harvey S. Pardee, $1400.00 a month; President, Charles A. Pardee, $875.00 a month; and Treasurer, Howard F. Kingsley, $875.00 a month. On

June 14, 1924, Harvey S. Pardee resigned as Chairman of the Board, and Charles A. Pardee as President and Director.

As far as the year 1923 is concerned, it appears from the record that the defendant Pardee was throughout the year an officer of the corporation, Miller & Pardee, Inc., and as such, was being paid a salary by that corporation. It also appears from the record that the plaintiff company, which was the operating company of this group, did a very good business in 1923, ~~better than in any prior years~~ No salaries had been fixed for the officers of this operating company prior to December , 1923, but on the ninth of that month, the directors adopted a resolution fixing the salary of the defendant, Harvey S. Pardee, as President, at $17,163.33. While the Board of Directors had the legal power to pass such a resolution fixing the salaries of the president, and other officers, to be earned by them and paid to them from that time on, we are of the opinion that the circumstances disclosed by this record are such that the resolution may not be given any retroactive effect. No action of any kind having been taken with reference to salaries, either as to postponing a determination of the question, or in any way referring to the matter, the directors could not get together near the close of the year, which turned out to be a prosperous one, and divide up those profits, even in part, by voting the officers large salaries. That the amounts voted as salaries by the directors at this meeting in December, 1923, were not justified, is indicated in our opinion by the fact that just about a month later, the

directors had another meeting fixing the salaries for 1923 at just about one-half of the amounts mentioned in the resolution of December, 1922. From the foregoing, it follows that we are of the opinion that the defendant, Harvey S. Pardee was authorized to receive as salary the amount designated in the resolution of December 9, 1922, only for the remainder of that year, and that he was, therefore overpaid $16,128.83.

As to the year 1923, we disagree with the contention of the plaintiff to the effect that the salary of $8500.00 fixed as the salary of the president for that year, under the resolution of January 13, 1923, did not apply to the entire year. The action was taken so near the first of the year that it would be unreasonable to make the distinction claimed. The conduct of corporations requires reasonable flexibility, and is not always to be treated with the rigor of exact chronology. In our opinion, the defendant was entitled to the full salary of $8500.00 for the year 1923.

As to the year 1924, the record shows that at a meeting of the Board of Directors, held on January 14 - apparently an annual meeting, - defendant Pardee was elected president of the plaintiff corporation, and Charles A. Pardee vice-president and treasurer, for the current year. No action was taken referring in any way to salaries. The record further shows that on March 10, 1924, the defendant resigned as president, and Charles A. Pardee resigned as treasurer of the corporation, and thereupon the Board of Directors elected Charles A. Pardee president of the corporation, and the defendant chairman of the Board. No action was

directors had another meeting fixing the salaries for 1923
at just about one-half of the amounts mentioned in the
resolution of December, 1922". From the foregoing, it
follows that we are of the opinion that the defendant,
Harvey B. Parker was authorized to receive as salary
the amount designated in the resolution of December 8,
1922, only for the remainder of that year, and that he
was, therefore overpaid $18,188.82.

As to the year 1923, we disagree with the conclusion of the plaintiff to the effect that the salary of $5000.00 fixed as the salary of the president for that year, under the resolution of January 12, 1923, did not apply to the entire year. The action was taken on next the first of the year that it would be unreasonable to make the distinction claimed. The conduct of corporations requires reasonable flexibility, and is not always to be treated with the rigor of exact chronology. In our opinion, the increase was entitled to the full salary of $5000.00 for the year 1923.

As to the year 1924, the record shows that at a meeting of the Board of Directors, held on January 12 - [illegible] annual meeting, - [illegible] elected president of the plaintiff corporation, and Charles F. Parker vice-president and treasurer, for the ensuing year. No action was taken returning in any way to salaries. The record further shows that on March 5, 1924, the defendant resigned as president and Charles F. Parker resigned as [illegible] corporation, and thereupon the Board of Directors

taken with regard to salaries until a later meeting of the Board, held on April 26, 1924, at which time the resolution was adopted fixing the salary of the defendant as chairman of the Board at $1400.00 a month for the year 1924; and fixing the salary of Charles A. Pardee as president of the corporation at $875.00 a month for that year. On June 14, 1924, both the Pardees resigned from the offices they held, and from the Board of Directors. In our opinion, the salaries voted by the Board of Directors at their meeting in April should attach to the respective offices referred to from the time the Pardees were elected to those offices on March 10, 1924, until they resigned on June 14, 1924. The defendant, Harvey S. Pardee, would, therefore, be entitled to receive his salary as chairman of the Board from March 10 to June 14, 1924, at the rate of $1400.00 a month, which would be $4,385.00. The defendant was paid on account of salary, during the year 1924, the sum of $6,883.19. This was $2,498.19 more than he was entitled to. Therefore, the plaintiff is entitled to recover back from the defendant for moneys received by the latter, over and above the amounts he was entitled to in 1923 and 1924, a total of $18,627.02.

As to the counterclaim of the defendant Harvey S. Pardee, the record shows that the trial court allowed it to the extent of $7120.00, finding that amount to be due the defendant under the contract he claimed for his services under resolution of June 14, 1924, covering the period beginning at that time and extending to the end of that year. We have expressed our views with regard to

that resolution in the opinion being filed this day, bearing the General Number 30691. The reasoning on this subject which is there set forth, is applicable here, and the result is that, in our judgment, this claim of the defendant may not be allowed.

The plaintiff makes a claim for certain miscellaneous items, amounting to $780.88. It is urged that one Gregg did certain work for Harvey S. Pardee, and that it was paid for to the extent of $745.52 by checks of the defendant; and that four small bills of the defendant, amounting to $35.36, were paid by the plaintiff. The trial judge refused to allow them. The evidence as to the Gregg matter is conflicting, and to such an extent, that we do not feel justified in overriding the decision of the trial judge on that item. Further, it is a fair inference that when the matter of the overdraft was finally arranged, those matters, not only the Gregg item, but, also, the item of $35.36, were included, and, as a result they should be considered as settled.

In the instant case, therefore, our judgment is as follows: (1) that the plaintiff, General Automotive Corporation, is entitled to recover on its claims against the defendant Harvey S. Pardee, for over payment of salary, the sum of $18,827.02; and (2) that the defendant is not entitled to recover anything on his set-off for alleged salary for the period beginning June 14, and ending December 31, 1924, because we hold, as a matter of law, that the resolution of June 14, 1924, may not be treated as creating a binding obligation on the corporation for the period following the date of the resolution. As the

issues were submitted in the trial court without the intervention of a jury, the judgment of the court will be reversed, with a finding of fact, and judgment entered here in favor of the plaintiff and against the defendant in the sum of $18,627.03.

REVERSED WITH A FINDING OF FACT AND JUDGMENT HERE.

O'CONNOR, J. AND THOMSON, J. CONCUR.

FINDING OF FACT: We find as a fact that the defendant Harvey S. Pardee was overpaid in salary to the extent of $16,128.83 in 1923, and $2,498.19 in 1924.

5560

427 - 30690

MILLER & PARDEE, INC., a corp.,

Appellant,

v.

CHARLES A. PARDEE,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

243 I.A. 602

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by Miller & Pardee, Inc., plaintiff, from a judgment in favor of Charles A. Pardee, defendant, in the sum of $412.50. We have this day filed an opinion in Miller & Pardee, Inc. v. Harvey S. Pardee (General Number 30691), in which we considered all matters of evidence and law in issue in this case, and as a matter of convenience, adopt that opinion, in so far as it is apt, in this case.

In our judgment, Miller & Pardee, Inc., (1) is not entitled to recover anything on its claim against Charles A. Pardee for salary - which is in accord with the finding of the trial judge - and (2) that, as a matter of law, Charles S. Pardee, is not entitled to recover anything on his set-off for alleged salary for the period beginning June 14, and ending December 31, 1924. Other items of set-off may not be considered here in the absence of cross-errors.

For the reasons set forth, the judgment will be reversed.

REVERSED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

MILLER & PARKER, INC.,
a corp.,

Appellant,

v.

CHARLES V. PARKER,

Appellee.

2431.A. 602

IN BANC.

DISTRICT COURT

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE RAYON delivered the opinion of the court.

This is an appeal by Miller & Parker, Inc., plaintiff, from a judgment in favor of Charles V. Parker, defendant, in the sum of $413.80. We have this day filed an opinion in Miller & Parker, Inc. v. Harvey S. Parker (General Number 30821), in which we considered all matters of evidence and law in issue in this case, and as a matter of convenience, adopt that opinion, in so far as it is apt, in this case.

In our judgment, Miller & Parker, Inc., (1) is not entitled to recover anything on its claim against Charles V. Parker for salary - which is in no event with the finding of the trial judge - and (2) that, as a matter of law, Charles V. Parker, is not entitled to recover anything on his set-off for alleged salary for the period beginning June 14, and ending December 31, 1924. Other items of set-off may not be considered here in the absence of cross-errors.

For the reasons set forth, the judgment will be reversed.

REVERSED.

O'CONNOR, P. AND MCSURELY, J. CONCUR.

480 - 30744

JAMES E. DUFFY,
Appellee,

v.

JOHN L. ENGSTROM,
Appellant.

243 I.A. 603

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an action for personal injuries brought in the Superior Court by James E. Duffy, the plaintiff, against John Engstrom, the defendant. There was a trial before the court with a jury and a verdict and judgment in the sum of $4,250.00, in favor of the plaintiff. This appeal is therefrom.

The declaration consists of two counts. The first charges negligence on the part of the defendant in driving his automobile at a greater rate of speed than ten miles an hour, contrary to the statute; and the second charges the defendant with general negligence.

On October 21, 1922, about noon, the plaintiff, a sign painter, sixty six years old, started east to cross over Broadway, a north and south business street in the City of Chicago. He left the west sidewalk at a point between two east and west street crossings on Broadway. He was going to his sign painting shop, which was located at number 5213 on the east side of Broadway. He started from a point on Broadway which was a short distance to the north of his

Appellant,

v.

Appellee.

Opinion filed Oct. 15, 1838.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an action for personal injuries brought in the Superior Court by James R. Daly, the plaintiff, against John Hampton, the defendant. There was a trial before the court with a jury and a verdict and judgment in the sum of $4,250.00, in favor of the plaintiff. From appeal is therefrom.

The declaration consists of two counts. The first charges negligence on the part of the defendant in driving his automobile at a greater rate of speed than was lawful, contrary to the statute and the second charges the defendant with general negligence.

On October 21, 1838, about noon, the plaintiff, a man sixty-six years old, started east to cross over Broadway, a north and south business street in the city of Chicago. In fact the west sidewalk at a point between the east and west street crossings on Broadway. He was going to his cigar printing shop, which was located at number [illegible] on the east side of Broadway. He started from a point on Broadway midway and a short distance to the north of his

2431 I.A. 603

shop. He walked from the west sidewalk of Broadway easterly to a point about the center, between the rails, of the south bound street car tracks. When leaving the west sidewalk he passed in front of a Ford car which was parked at the west curb.

As to what transpired up to the time of the collision, the only witness for the plaintiff was himself. His evidence is to the following effect: He walked south down the west side of Broadway until nearly opposite his shop at number 5813, and then desiring to cross over to the east side, he looked to the north, and seeing no vehicles coming, walked out into the street. At the time there were several automobiles on the other side coming from the south. He walked out into the south bound street car tracks and waited there between the rails for the northbound automobiles, of which there were several, to go by. At that time, he was facing southeast. He stood there a short time, when he heard somebody - who turned out to be the defen ant - shout, "Hey." He then turned around, and saw the automobile, driven by the defendant, about ten feet away, making right for him. He then turned in towards the curb, from where he was standing, jumped west, and got beyond it, clear of it, when it turned around and came right back, that way, west. He was not able to get away, and it struck him. He was not knocked completely down. One of his feet went under the machine and the knee of the other leg upon the bumper. He managed to pull himself up on the bumper. The automobile then ran out of the car tracks and towards the west curb, and into a Ford sedan, and broke both his legs, and his right wrist. From the curb, east to the west rail of the south bound track is 32 feet;

east to the west rail of the south bound track is 32 feet; there are six lanes, and his right wrist. From the curb, traffic and towards the west curb, and into a ford sedan, and on the bumper. The automobile then ran out of the car at the other leg upon the bumper. He managed to pull himself down. One of his feet went under the machine and the tires to get away, and it struck him. He was not knocked completely returned and came right back, went. He was not able then turned in towards the curb, from where he was standing, impact ten feet away, moving right for him. He he then turned around, and saw the automobile, driven by the somebody - who turned out to be the defendant - about, "Hey." excitement. He cried there a short time, when he heard there were several, to go by. At that time, he was facing out into the street. At the time there were several automobiles on the other side coming from the south. He walked he looked to the north, and seeing no vehicles coming, walked number 1113, and then desiring to cross over to the east side, the west side of Broadway until nearly opposite his shop at evidence is to the following effect: He walked south down ion, the only witness for the plaintiff was himself. His As to what transpired up to the time of the collis-

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passed in front of a taxi cab which was parked at the west bound street car tracks. When leaving the west sidewalk to to a point about the center, between the rails, of the south shop. He walked from the east sidewalk of Broadway southerly

and, from the point on the sidewalk, where he stood before starting to cross the street to where the Ford sedan was, is 115 feet. The defendant drove his automobile in a zigzag diagonal way after it first struck the plaintiff.

On cross-examination the plaintiff testified that he looked north when he got to the curb, and also when he got far enough out so as to be certain that there was nothing coming in that block and nothing in the next block to the north; that when he heard the warning he whirled around to the left, towards the automobile that was coming, and as he turned and was looking at it, the defendant turned it right in towards where he was and he jumped off towards the west, as that seemed the best thing to do, and was clear of it; that when it swerved back again towards where he was, he jumped the other way, "but I didn't get by that way and it got me"; that when he first jumped he got to a point about 8 or 10 feet west of the west rail of the south track. When asked what he did then, he answered, "Then I saw the car coming theother way at me, he turned his wheel and ran at me that way, andI jumped back but I didn't get far, and he started to go back, then he headed the car the other way." He further testified that when he heard somebody say, "Hey", he is of the opinion that the wheels of the automobile were west of the south track and the front of the car turned somewhat towards the east; that he kept his eyes on the automobile all the time and tried to get out of its way. He further testified, "It turned towards the west when it first came; when I jumped towards the west it turned west; then it was towards the east first, and he turned towards the east so it turned towards the east like that (indicating) and I jumped like that (indicating)

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On cross-examination the plaintiff testified
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starting to cause the street to shake the ford sedan was,
and, from the point on the sidewalk, where he stood before

and it turned around then and then I got back and I only got back part way." and was struck by the radiator; that he caught on the fender and his left foot caught in the bumper and he was dragged on the street, but finally managed to get his foot out and stood up on the bumper; that after the automobile stopped, he was on the west side right next to the curb.

The evidence of the defendant is substantially as follows: He was a painter and decorator, and had been in that business about fifteen years. The day in question, he was driving a Buick, a five passenger touring car, with the top up, which he owned and which he had been driving for about eight months. When going south on Broadway he saw the plaintiff coming out from in front of a car that was parked by the curb about 75 or 100 feet ahead of him. He, the plaintiff, walked from the west curb in a southeasterly direction into the south bound car track, and then threw up his hands and ran straight back in front of his, the defendant's automobile, when he was about 10 feet from him, the plaintiff; that he, the defendant, saw the plaintiff look west, and when he saw him look up, he, the defendant, swung his automobile to the west, close to the curb on the west side of the street, and bumped into a Ford sedan, which was standing there. He testified that he could not help it, and that from the point where the plaintiff was when the automobile struck him to where the Ford sedan was, was about 20 or 22 feet. He was going from 12 to 15 miles an hour, and there were no automobiles ahead of him, and no automobiles coming north. When he started to turn his automobile

to the west, he turned it enough to clear the plaintiff. The brakes of his automobile were in perfect condition that morning, as he had put in new ones and had tried them out about a week before the accident and they worked perfectly. He put on the brakes when he swerved the automobile the second time by putting both feet on the pedals.

On cross-examination he testified that when he first saw the plaintiff he was driving about a foot or two out of the south bound car track, straddling the west rail, and was going in back of , to the west of the plaintiff. When asked if he gave any warning or shouted, he answered, "No,sir." He further testified that there were no automobiles coming from the south on the other side of the car tracks, and that he, the defendant, had the full width of the road, with the exception of the parked cars; that as a result of the accident the radiator of his automobile was bent and the rim broken, and on the Ford sedan the steel plate in the rear was bumped. When he first turned his automobile to the west, it was about 20 to 22 feet from the rear of the Ford sedan, on a diagonal line.

The evidence of one Johnson - called by the plaintiff - an automobile salesman, whose place of business was at 5214 Broadway, on the west side of that street, was to the following effect:- Looking out of the window on Broadway, he saw the Buick of the defendant, with the plaintiff hanging over the radiator; the automobile was going south towards the west curb, and was then traveling at a speed of about 30 miles an hour. From where he first saw it, with the plaintiff hanging on to the point where it struck the Ford sedan

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the steel plate in the rear was bumped. When he first turned
his automobile to the west, it was about 30 to 35 feet
from the rear of the Ford sedan, on a diagonal line.

The witness of one Johnson - called by the plain-
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30 miles an hour. Then where he first saw it, with the plain-
tiff hanging on to the point where it struck the Ford sedan

was about 45 to 50 feet. After it struck the Ford sedan, he immediately went out and helped get the plaintiff from out between the cars. The door of the Ford sedan was jammed in and the radiator on the Buick was shoved back considerably. When he first saw the defendant's automobile it was about six feet west of the south bound car track, headed towards the west curb, and about 25 feet north of the entrance of his, the witness's store. He went in a westerly direction towards the west curb, with the plaintiff hanging over the radiator, facing the driver. On cross-examination he testified he did not recall seeing any other automobiles going north at that time; that after the plaintiff had been taken to the hospital he examined the brakes on the defendant's automobile and found that they were not very effective "because you co ld push the left pedal almost down to the floor without any resistance;" that he made his examination about an hour and a half after the accident.

The witness, Von Berte - called by the plaintiff - an automobile salesman, testified substantially as follows: He was driving south at the time in question and saw the defendant's automobile 150 to 300 feetahead of him. Suddenly he "noticed that car dodge a little by and then I had a view of Mr. Duffy in the south bound street car track - then the car - I was directly behind him, in back of him. I didn't see him then, but the car, after the car passed the point where I was, I saw Mr. Duffy standing there and he was thrown towards the curb." There was a Ford sedan parked there. When asked how fast the defendant's automobile was going, he answered, "I should judge he was going approximately 25 miles

an hour." He further testified that the defendant's automobile did not slow up as it headed towards the curb; that it was in the car tracks, and made a turn towards the west curb, going south and "then I saw the crash, the bump, and the front end of the Buick come in contact with the read end of the Ford sedan." The distance from where the plaintiff was standing to where the Ford Sedan was parked was between 100 and 150 feet. He did not see any vehicles immediately ahead of the defendant's automobile. Broadway at the place in question is wide enough to allow two auotmobiles to pass between the curb and the car tracks. On cross examination he testified that at the time he, the witness, was driving at the rate of 20 miles an hour; that at the time of the accident a street car was going north. When asked if he saw the plaintiff before the accident, he answered, "I just had a glance at the accident;" that at that time the defendant's automobile was near the car track, out towards the center of the street; when he saw it next it was headed towards the west curb; that he did not see the plaintiff going west from the curb; that he, the witness, was following directly behind the defendant's automobile, and he got just a glance of the plaintiff when the defendant's car swerved, after that he did not see the plaintiff; that all he saw of the plaintiff was when he was standing near the car track, facing directly east; that there were several cars parked along the west curb, but no cars parked opposite where he first saw the plaintiff.

Berbeles, called for the defendant, testified substantially as follows:- At the time in question he was driving a Ford truck south on Broadway about five feet behind

the defendant's automobile. When he got into the 5200 block on Broadway, he saw the plaintiff walk east in the middle of the block onto the south bound street car track. He, the witness, turned his truck to the east side of the west track. He then saw the defendant swerve, to get away from the plaintiff. The defendant tried to go west, and then east. He did not hear anybody shout before the defendant's automobile struck the plaintiff. He did not at the time of the accident see any automobiles going north on the north bound track or drive, nor any street car. On cross-examination he testified that the defendant's automobile at the time was in the middle of the car tracks, the east wheels between the rails of the south bound tracks and the west wheels over towards the west curb; that when the defendant's automobile struck the plaintiff, the plaintiff was about 20 feet behind the Ford sedan. He further testified that the defendant's automobile was straddling the west rail of the south bound tracks, until he bumped into the rear end of the Ford sedan; that he, the witness, stopped his truck when the plaintiff was on the fender of the defendant's automobile; that he, the witness, stopped his automobile before the defendant stopped his.

The chief contention for the defendant is that the verdict was against the manifest weight of the evidence. It is urged that the plaintiff did not look north when he started to cross Broadway. He says he did, and seeing no vehicles coming, he walked outinto the street; that he looked north when on the curb and also when he got far out; that for a block and a half north, he saw none coming south. It is true that the defendant says that when he, the defendant

It is true that the defendant says that when he, the defendant, got for a block and a half north, he saw none coming south, looked north when on the curb and also when he had far enough, entered the street, he says he did, and seeing no approaching cars, he walked out into the street; that he started to cross Broadway. He says he did, and seeing no car coming from the south he continued to walk across the street. It is argued that the plaintiff did not look north when he entered the street against the oncoming traffic of the evidence.

The chief contention for the defendant is that before the defendant stepped his automobile, that he, the witness, stopped his truck when the plaintiff was on the fender of the defendant's automobile; that he, the witness, stopped the rear end of the ford sedan; that he, the witness, stepped west half of the south bound traffic, until he passed into the south bound traffic lane, and the witness then testified that the defendant's automobile was standing the plaintiff was about 30 feet behind the ford sedan. He further that when the defendant's automobile struck the plaintiff, the south bound tracks and the west wheels over towards the west curb; car tracks, the east wheels between the rails of the south bound automobile at the time was in the middle of the any street car. On cross-examination he testified that the automobiles going north on the north bound tracks or drive, not not part entirely about before the defendant's automobile struck the plaintiff. He did not at the time of the accident see any it. The defendant tried to go west, and then east. He did by then saw the defendant swerve, to get away from the plaintiff, turned his truck to the east side of the west track. on Broadway, he saw the plaintiff walk east in the middle of the block onto the south bound street car track. He, the the defendant's automobile. When he had left the 4500 block

the defendant's automobile. When he got into the 5200 block on Broadway, he saw the plaintiff walk east in the middle of the block onto the south bound street car track. He, the witness, turned his truck to the east side of the west track. He then saw the defendant swerve, to get away from the plaintiff. The defendant tried to go west, and then east. He did not hear anybody shout before the defendant's automobile struck the plaintiff. He did not at the time of the accident see any automobiles going north on the north bound track or drive, nor any street car. On cross-examination he testified that the defendant's automobile at the time was in the middle of the car tracks, the east wheels between the rails of the south bound tracks and the west wheels over towards the west curb; that when the defendant's automobile struck the plaintiff, the plaintiff was about 30 feet behind the Ford sedan. He further testified that the defendant's automobile was straddling the west rail of the south bound tracks, until he bumped into the rear end of the Ford sedan; that he, the witness, stopped his truck when the plaintiff was on the fender of the defendant's automobile; that he, the witness, stopped his automobile before the defendant stopped his.

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was 75 or 100 feet away, he saw the plaintiff coming out from in front of a car parked at the curb; but on cross-examination, he says, that when he first saw the plaintiff, he, the defendant, was going in back of, to the west of the plaintiff, impliedly stating that he did not see the plaintiff till the latter was close to his, the defendant's car. Also, Berbeles testified that when he got into the 5200 Block on Broadway, he saw the plaintiff walk east onto the south bound track. Such being the record, the jury may have felt justified in believing the plaintiff's testimony, and, not having the advantage which they had, of seeing the witnesses, and with the conflict in the evidence, such as it is, together with its manifest discrepancies, we certainly would not be justified in holding that the plaintiff's testimony that he looked both before and after he started was clearly overcome by that given for the defendant. Having looked to the north, and having seen nothing in the way, he was not chargeable with negligence in crossing over to the middle of the south bound tracks, and when he got there and stood waiting, he was within his rights, and the defendant, coming from the north, was bound to exercise reasonable care, both as to the direction he drove, and as to the giving of a warning, and, also, was bound to obey the state motor law in regard to speed. The defendant admits he was driving, at the time, at 12 to 15 miles an hour. Johnson, who apparently had a good view, says about 20 miles an hour. Von Berte says, approximately 25 miles an hour. Such being the evidence as to speed, it obviously follows that we are not entitled to hold that the jury would not be justified in considering

ing and saw the plaintiff coming out
from in front of a car parked at the curb, put on sudden-
ly at 100 feet away, he saw the plaintiff coming out
from behind the car, and as to the driving of a certain
motor car, was bound to exercise reasonable care, both as to
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Bloom on Broadway, he saw the plaintiff walk west onto the
Also, Berglee testified that when he got into the middle
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exception, he says, that when he first saw the plaintiff,
then in front of a car parked at the curb, put on sudden-
ness AB on 100 feet away, he saw the plaintiff coming out

the evidence as to speed in and of itself, insufficient to show negligence; reason and the Motor Vehicle Act suggest quite the contrary. The question then remains whether, after the defendant became aware of the nearness of the defendant's automobile, he did or refrained from doing anything that would be expected of a prudent , careful man. The plaintiff says he stood in between the rails of the southbound track a short time, and then heard a shout, "Hey"; that he then turned around and saw the defendant's automobile about 10 feet away, making right for him, and then jumped west, as it seemed best to do, and got beyond and clear of its path, but that it then changed its course and turned again towards him, and not being able to avoid it, he was run into. The defendant says that the plaintiff walked from the curb, southeasterly, into the south bound tracks and then threw up his hands and ran straight back in front of the automobile; and that he, the defendant gave no warning. The evidence of other witnesses is that the defendant's automobile swerved to the west. It will be seen that there is no evidence that the plaintiff failed in his duty to exercise care. It is to be presumed that, being in sudden peril, he undertook to save himself. What he states he tried to do, was an endeavor to get away. If what he did just got him clear, and then the defendant changed the course of his automobile, and escape became impossible, the jury could not justifiably hold him, the plaintiff liable for a want of care, for contributory negligence. The defendant admits that after his automobile struck the plaintiff, it went 20 to 22 feet, and then ran into the Ford Sedan. In the course of that time,

the plaintiff did all he could to save himself from injury. He clung to the bumper and the front of the defendant's automobile; but when it went on and collided with the Ford Sedan he was seriously injured. Such being the evidence, we do not feel entitled to override the verdict, on the ground that it was against the manifest weight of the testimony on the issue of contributory negligence. It is argued that the evidence is in conflict as to whether there were automobiles or street cars going north on the east side of Broadway. It is in conflict on that subject, and well might be, but the plaintiff testified that at the time he was in the south track there were several automobiles coming from the south and he waited for them to go by. Johnson merely said he remembered none, and Von Berte said that, at the time, a street car was going north. Berbeles said he did not see, at the time, any automobiles or a street car going north; and the defendant said there was no automobile going north at the time. Though there is a conflict on that subject and some differences as to what was seen, it does not justify the conclusion that it would be clearly against the weight of the evidence for the jury to conclude that the plaintiff did not stand and wait for some vehicle from the south to go by.

All the matters of fact, which we have briefly discussed, were for the jury. The questions of negligence, contributory negligence and proximate cause were all for the jury and their verdict on those subjects may not be overriden by this court unless clearly against the manifest weight of the evidence. The Chicago and Alton Rd. Co. v. Lewandowski, 190 Ill. 301; Gibbons v. A.E.& C. R.R. Co., 263 Ill. 366; C. C. C. & St. L.

Ry. Co. v. Henry, 143 Ill. App. 265; Winn v. C. C. C. & St. L. Ry. Co., 239 Ill. 133. In our judgment the approach of the defendant's automobile, the immediate movements of the plaintiff, the driving and course the automobile took, the carrying of the plaintiff on the front of the automobile, and the final collision with the Ford Sedan were all matters for the jury and could well be considered as one unbroken chain of events precipitated in toto by the negligence of the defendant. We are, therefore, of the opinion that the verdict is not clearly against the weight of the evidence on either count, that is as to speed, a violation of the Motor Vehicle Act, or general negligence of the defendant without contributory negligence on the part of the plaintiff. Gavigan v. Gold, Gen. No. 39489.

It is urged that there is no allegation in the declaration to support evidence as to what succeeded the first collision between the defendant's automobile and the plaintiff, and that the testimony as to the plaintiff being carried on the bumper and radiator of the defendant's automobile until it collided with the Ford Sedan was inadmissible. As we have already said, there was a series of motions, all of which were involved in the question of negligence, whether general or contributory. They constituted the general area of facts concerning which evidence was competent. And it was not necessary to plead them in detail. City of Elgin v. Anderson, 89 Ill. 527. The very fact, which the defendant testified to, that he drove his automobile from 80 to 22 feet after it struck the plaintiff and before it collided with the Ford Sedan is quite striking evidence bearing not only on the speed

Ford Sedan is only slightly ~~existing~~ heavier only on the chance
pearing
after it struck the plaintiff and before it collided with the
pavement, that he drove his automobile from 80 to 85 feet
further", 98 Ill. App. The very fact, which the defendant
not be necessary to plead them in detail. Gray vs. Illinois C.
of facts concerning which evidence was competent. And it was
General or contributory. They constituted the general case
of which were involved in the question of negligence, whether
or he knew already well, there was a series of matters, all
ample until it collided with the Ford Sedan are immaterial.
married on the number and register of the defendant's auto-
plaintiff," and that the testimony on behalf plaintiff being
first multiplied between the defendant's automobile and the
deliberately to subpoena as to what succeeded the
It is urged that there is no allegation in the

No. Negro.

negligence on the part of the plaintiff. Carlson v. Bell & Com-
general negligence of the defendant without qualifying by
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tiff cilation with the Ford Sedan were all matters for the
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tiff, the driver and owner the automobile knew, the circum-
defendant's automobile, the immediate movements of the plain-

In our judgment the opinion of the

but on the question of his care. There is nothing in the reasoning of the court in East St. Louis Elec. St. Ry. Co. v. Steger, 65 Ill. App. 312, cited for the defendant, adverse in principle to what we have stated above.

It is contended that error was committed in giving instructions numbered 2, 5 and 6. Instruction number 2, is as follows:

> "If the jury believe from the evidence that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant as charged in the declaration, or either one of the counts thereof, then you should find the defendant guilty."

The criticism made is that it did not tell the jury "that in order to find defendant guilty his negligence must be the proximate cause of the injury." The answer to that is, it did tell the jury that the injury must be "in consequence of the negligence of the defendant," and it could not be a consequence of the defendant's negligence unless his negligence was the proximate cause. High v. Waterloo, C.F.& N. Ry. Co., 190 N.W. 331 (Iowa).

Instruction number 5 instructed the jury that negligence on the part of the plaintiff, if any there was, would not bar a recovery by him unless it was the proximate cause of his injury," and it is claimed that it failed "to tell the jury that plaintiff's negligence would bar a recovery if it proximately contributed to his injuries." We do not think the instruction properly states the law. Lerette v. Director General, 306 Ill. 348. But we also think that it is not of such import as to justify a reversal

think that it is not of such import as to justify a reversal
for error." Richardson Control, 306 Ill. 308. But we also
do not think the instruction properly states the law.
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mate cause of his injury," and it is claimed that it failed
would not bar a recovery by him unless it was the proxi-
negligence on the part of the plaintiff, it may then use"

Instruction number 8 instructed the jury that

190 N.E. 837 (1934).
was the proximate cause. Black v. Peabody C.C.A.R. Co.,
dence of the defendant's negligence unless his negligence
and it could not be a concur-
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Cause of the defendant charged in the declaration,
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the plaintiff, while in the exercise of ordinary
"If the jury believe from the evidence that

giving instructions numbered 2, 3 and 8. Instruction number 3,
is as follows:

It is contended that error was committed in

in pursuance to what we have stated above.

Steuart, 88 Ill. App. 318, cited for the defendant, advance
reasoning of the court in Hunt St. Ferry Co. v. Co. v.
put on the question of his care. There is nothing in the

of the judgment. Further, other instructions, such as the defendant's numbered 2, states that "if the jury finds that the plaintiff in this case was guilty of any want of ordinary care for his own safety, which said want of ordinary care caused or proximately contributed to cause the accident complained of, then he cannot recover no matter if the defendant is guilty of the negligence charged in the plaintiff's declaration or any count thereof." That gave the jury the law correctly.

Objections are made to instru ction numbered 6, but upon examination of them, we are of the opinion that they are not well founded.

For the reasons stated above, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. CONCURS;
THOMSON, J. SPECIALLY CONCURRING:

The most serious contention of the defendant is that the plaintiff was guilty of contributory negligence in failing to see the defendant's car approaching and in carelessly walking out into the street without exercising reasonable care for his own safety. Broadway is an unusually wide street with 22 feet between the west curb and the westerly street car rail. The plaintiff testified that he looked north as he left the curb and saw no vehicle approaching in that block or the next one to the north. He walked that 22 feet and a step or two more, reaching a point between the rails of the first street car track and there he stopped and waited for several north bound cars to pass, the last of which was "down in the middle of the block." He says he stood there

'down in the middle of the block.'. He also be asked where for instance would Bond walk 20 here' the last of which one of the first street he knew and there he stopped and waited and a step or two more' assuming a point between the traffic block or the next one to the north. He walked that 20 feet or he left the curb and was in certain obstruction in that street one unit. The plaintiff testified that he looked north side street with 20 feet between the west curb and the westerly concourse edge for his own safety. Assuming it an unusually carefully walking out into the street without exercising in failing to see the defendant's car observing and in that the plaintiff was guilty of contributory negligence

The most serious contention of the defendant

I. BECAUSE CONCLUSIVE;

O, DENIED' 7. CONCURS;

ALL CONCUR.

be affirmed.

For the reasons stated above, the judgment mfly

that we not well founded.

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Objections are made to instructions numbered 6.

law accordingly.

decision on any count thereof. But from the time the and in spite of the testimony of the plaintiff's plained of, then he cannot recover no matter if the defendcaused or proximately contributed to cause the accident exercise for his own safety which may west of crossway was the plaintiff in fact guilty of any part of such defendant's numbered 3, stated that "if the jury finds that of the judgment. Further, other instructions, such as the

"A short time," and on cross-examination "possibly half a minute, - it might not be so long," - that he thought he better wait for the one down in the middle of the block to go by before he proceeded, and as he stood there for that purpose he heard someone shout "Hey" - and he turned to see the defendant's car coming at him ten feet away. He said he did not look to the north after getting out of the street car track as he felt he "was clear anyway." There were several cars parked along the west curb. There was over 15 feet of room in the clear, between the defendant and those parked cars. Even the defendant testified "there was plenty of room to go back of him." The defendant said he saw the plaintiff step out into the street when he was only 75 to 100 feet away. He also said he was going 13 to 15 miles an hour. Other witnesses put his speed at 20 and one at 25 miles an hour. According to the plaintiff's theory of the case the defendant was much farther away when the plaintiff left the curb. If the defendant was going 20 to 25 miles an hour while the plaintiff was walking approximately 25 feet and then stood "possibly half a minute" waiting for a car "down in the middle of the block" to pass, then the plaintiff was right in saying he saw nothing in the block he was in or the next one as he left the curb. Whether, under all those circumstances, he was guilty of contributory negligence was a question for the jury to pass upon, and their finding that he was not should, in my opinion, not be disturbed.

finding that he was not absent, in an opinion, not be disturbed, hence was a question for the jury to pass upon, and their all three eleemosynaries, he was guilty of contributory negli- was in on the next one to be left the camp. Whether, under plaintiff can right in saying he can nothing in the plank be one "down in the middle of the block" to pass, then the feet and then stood "possibly half a minute" waiting for a an hour while the plaintiff was walking approximately 22 left the camp. If the defendant was going 20 to 22 miles once the defendant saw Yarber away when the plaintiff miles an hour. According to the plaintiff's theory of the pump". Other witnesses and his speed at 20 and one at 22 100 feet away. He also said he was going 12 to 18 miles an plaintiff step out into the street when he was only 75 to of room to go back of him." The defendant said he saw the buried corp. Even the defendant testified "there was plenty feet of room in the alley" between the defendant and three colored men jumped along the west curb. There was over 12 one thing we be left be "was clear enough." There were he did not look to the north after getting out of the street the defendant's car coming at him ten feet away. He said purpose he heard somebody shout "Hey" - and he turned to see do it before he traveled, and is he stood there for that minute" - it might not be so long" - that he thought he - "A short time," and on cross-examination "possibly half a

490 - 30754

JOHN SUNDERMAN and
NELLIE SUNDERMAN,
(Complainants Below),

v.

CHARLES L. THAYER, etc.,
(Defendant) Appellant,

and

G. H. WILFORD,
(Defendant) Appellee.

On appeal of CHARLES L. THAYER,
Appellant.

243 I.A. 603

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a bill in the nature of a bill of interpleader, by which John and Nellie Sunderman, husband and wife seek to have determined to which of the defendants, Charles L. Thayer and G. H. Wilford, real estate agents, there shall be paid certain commissions for the sale of certain real estate made by the complainants to William M. Devine. The bill, also, asked that a certain suit at law, begun by Thayer, for a recovery of commissions should be enjoined; and that the defendant Wilford be enjoined from prosecuting a similar suit at law. Answers to the bill were filed by each of the defendants. There was a trial before the Chancellor, and a decree entered in favor of the efendant Wilford and that the $2,000.00 deposited by the plainants with the clerk of the court, be paid over to

This is an appeal by Thayer from that decree.

Opinion filed Oct. 19, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is a bill in the nature of a bill of interpleader, by which John and Nellie Hamilton, husband and wife, seek to have determined to which of the defendants, Charles F. Thayer and G. H. Hilford, said estate should be paid certain commissions for the sale of certain real estate made by the complainants to Hilford. Thayer. The bill, also, seeks to have a certain bill of sale, known by Thayer, for a recovery of commissions should be enjoined, and that the defendants Hilford be enjoined from prosecuting a similar suit at law. Answers to the bill were filed by each of the defendants. There was a trial before the Chancellor, and a decree entered in favor of the plaintiffs with the costs of the court, be paid over to Clarence Hilford and that the $5,000.00 deposited by the

243 I.A. 603

Appeal from
Edgar County.
Book Cavin.

(Complainants) Appellants,

and

G. H. HILFORD,
(Defendant) Appellee.

CHARLES F. THAYER, etc.,
(Defendant) Appellant,

v.

(Complainants below).

APPEAL FROM CIRCUIT COURT.

Mr. Appeal of CHARLES F. THAYER.

Opinion

The complainants, Sundermans, husband and wife, joint owners of Lots 25 to 33, inclusive, listed their property for sale with several realtors, but giving none of them an exclusive agency. Mr. Sunderman says he listed the property with the defendant Thayer about April 1, 1924, and a short time later listed it with other brokers; that the sale price was $95,000.00, on certain terms as to cash and deferred payments. He says he met Wilford, the other defendant, at his, Sunderman's house on April 19 or 20, and after Wilford told him he was in the real estate business, he listed it with him, Wilford; that Wilford told him a man down town told him about the property; that afterwards he sold the property to one Devine, whom he met through Wilford; and that it was agreed when the deal was practically through that the commission should be $2,000.00; that after the contract was signed, he, Sunderman, went to Thayer's office and told him that Wilford had sold the property to Devine; that Thayer said, "I showed that property to Mr. Devine, and I am going to call him up over the telephone and see what he has to say about it;" that that was the first time he knew that Thayer had ever been Devine; that Devine never told him that he had been shown the property by Thayer. On cross-examination, Mr. Sunderman testified that after the deal was closed, at his, Sunderman's house, Thayer said, "If I would give him my moral support he knew he would get half of the commission;" if not he would have nothing to do with it; that Thayer said, "If I would give him an exclusive sale on the property where I lived, he would drop the matter." Further, on cross-examination, he testified that when about April 19 or 20 Wilford

came to his house he said that he had heard the property was for sale; that he, Sunderman, asked him how he found out; that Wilford said he was a broker and his man told him. He further testified that he was in Thayer's office about April 16, and was there after it was signed; that several days after the contract was signed he was served with a written demand for commissions by Wilford. It is the evidence of Mrs. Sunderman that she had known Thayer for some years; that neither he nor any one connected with his office submitted the name of Devine as a purchaser.

It would seem from the testimony of Sunderman, who says he listed the property with Wilford, and sold it to Devine whom he met through Wilford, that Wilford was the procuring cause. Thayer, however, testified that Sunderman listed the property with him about March 25, 1924 - Sunderman says about April 1, 1924 - that he, Thayer, first saw Devine on April 17, 1924; and took him in his, Devine's car to look at the property; that he, Thayer, showed Devine through the building; that Devine said he had about $10,000.00 to invest and that he was interested; that he told Devine, Sunderman would probably give him a contract on $10,000.00; that Devine said he would not buy without a deed; that he asked Devine about how much he could pay a year and Thayer said $2,000.00 or $3,000.00; that he asked Devine to make a proposition; that Devine said, "I will do that and let you know in a few days;" that then Devine drove him back to his office. He, Thayer, further testified that he first heard that a sale had been made to Devine, on April 25; that on April 25, Sunderman came to his, Thayer's office, and he told Sunderman that "Devine

to pin' Jhelan's ailing" may be told Bumbleman that "Devine made to Devine' on March 28' that on April 28' Bumbleman and further testified that he first heard that a rule had been that then Devine drawed pin pac. to pin ailing'. He' Jhelan' Devine said" "I will do that and let him know in a few days." $2'000'00' shall be mailed Devine to make a deposit' that you may be could ha a loan and Jhelan and $5'000'00 or be would not ind without a deed' that be mailed Devine upon Prosperity Give pin a mortgage on $10'000'00' that Devine said and that he was interested' that be told Devine' Bumbleman would particular that Devine said be ind about $10'000'00 to insure at the Procurable that he' Jhelan' missed Devine shortly the March 17' 1924' and took him in pin' Devine's can to look about April X' 1924 - that be' Jhelan' first was Devine on the Procurable with pin about March 28' 1924 - Bumbleman subscribed owning owner. Jhelan' however' testified that Bumbleman listed Devine upon be not through Milford' that Clifford was the succeeded with pin about April' and said it to make be listed the Procurable with Milford' and said it to

It would seem that the testimony of Bumbleman' who

on a Prosecutor.

ch, one connected with pin office submitted the name of Devine that she had known Thelen for some Years' that neither be not communications by Milford'. It is the evidence of Mrs. Bumbleman the contract was signed he was mailed with a written demand for $2' and was three after it was signed' that payment date after further testified that he was in Hurley's office about that Clifford said be was a Broker and pin was just pin'. He for self that be' Bumbleman' mailed pin how be local out; came to pin Devine be said that be pay bond the Procurable was

is our customer. He is the man I had down there looking at it."

Thayer, further, testified that the day that he showed it to Devine, April 17, he saw Sunderman at the latter's house, and told him that he had shown it to a man; that although he usually gave the name of the party, he would not swear that he told Sunderman the man's name, especially as Sunderman said he did not; that Sunderman was in his office twice between April 17 and 25, and on one of those occasions said he had some one interested and it looked as if he might make a sale; that when the sale was made, Sunderman told him that Wilford was the broker; that he told Sunderman, he, Thayer, was entitled to the commission; that he asked Sunderman where Wilford was located, and was told, in the Stock Exchange Building; that he went there and found Wilford's name on the Bulletin Board, Room 939; that he went there and found Devine's name on the door, but not Wilford's; that the telephone directory gave, G. H. Wilford, 917 E. 50th Street, the same address as the place where Devine lived; that although Wilford and Devine had different telephone numbers, they both lived at 917 East 50th Street. He further testified that he advertised the property for sale in the Chicago Tribune for a week, beginning April 11, 1924. Mayer E. Thayer, a daughter of the defendant and who was an employee of the firm of Bacon and Thayer, testified that one who said his name was Devine inquired over the telephone about the property in question, which the firm had advertised; that she told him she could not give addresses over the telephone, but if he wished to see the property, Mr. Thayer would be glad to show it to him;

Thayer, Preston, testified that the day that
he showed it to Devine, April 17, he was downtown at the
latter's house, and told him that he had shown it to a man;
that although he usually gave the name of the party, he
would not answer that he told Henderson the man's name, explain-
ing as Henderson said he did not, that Henderson was in his
office twice between April 17 and 22, and on one of those
occasions said he had some one interested and it looked as if
he might make a sale; that when the man, Henderson
told him that Hilford was the tenant that he told Devine-
man, he, Thayer, was entitled to the commission that he
asked Henderson about Hilford and was told
in the Stock Exchange Building. What he went there and found
Hilworth name on the door, but not Hilford;
Hilworth name on the Directory, from 1923 that he went
there and found Devine's name on the door, but not Hilford;
that the telephone directory name, C. H. Hilford, 917 E. 80th
Street, the same address as the place where Devine lived that
they both lived at 917 East 80th Street. Mr Thayer testi-
fied that he advertised the property for sale in the Chicago
Tribune for a week, beginning April 17, 1924. Thayer, a
daughter of the defendant and who was an employee of the firm
of Devine and Thayer, testified that one she said his name
was Devine and Thayer, but it be wished to
see the property, Mr. Thayer would be glad to show it to him;
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of Devine and Thayer, testified that one she said his name
was Devine and Thayer, but it be wished to
see the property, Mr. Thayer would be glad to show it to him;

that an appointment was then made for 9 A.M. April 17; that she made a note of it in the appointment book; that the next day, April 17, Devine called and said he had an appointment with Mr. Thayer; that she then sent her brother across the street where her father was getting his car, and Thayer came over to the office; that then he and Devine went off in the latter's car. She, further, testified that after April 17, Sunderman came to the office and said he had some one interested in the property, a downtown broker who handled big money to swing a big deal; that she said, "We have some one, my father showed it to;" that her father "showed it the other day to a man who was very much interested, but he promised to submit an offer to us but we haven't heard as yet;" that Sunderman said, "Well, don't give up, it isn't for sure, but I think its going through." She testified on cross-examination that when she talked to Sunderman on April 19 or 20, she did not give the name of the man who was interested; that it was not her business to do so.

There is no doubt from the evidence that Thayer first called Devine's attention to the property, in fact, that is not denied on Wilford's behalf. But it is the contention that Thayer was not the procuring cause of the sale to Devine.

Devine testified that he had an office in the Stock Exchange Building, and that Wilford, associated with one Brennan, was in the same office; that he called up the office of Bacon & Thayer by telephone, and made an appointment to go and see the property; that on the day in question,

that on examination was then made for 9 A.M. April 17;
that she made a note of it in the appointment book; that
the next day, April 17, Davies called and said he had
an appointment with Mr. Thayer; that she then sent for
Dwelley Dunham the street where her father was getting his
car, and Thayer came over to the office; that when he and
Davies went all in the latter's car. She, Dawson, identified
that slip April 17, Dunkumen came to the office and said he
had come over interested in the property, a downtown proper-
ty owned by Mr. Dawson's aged father; that she said
"he have come now, my father showed it to". that her
father showed it the other day to a man who was very much
interested, but he promised to submit an offer to us
tomorrow." She testified on cross-examination that when
don't give up, it isn't for sure, but I think its going
put me Dawson's heard no let;" that Dunkumen said "well"
there is no doubt from the evidence that Thayer
made to do so.

The fact that Thayer was not the procuring cause of
that is not denied on Wilkins's behalf. But it is the
first called Davies's attention to the property, in fact,
the sale to Davies.

Davies testified that he had an office in the Edson
Exchange Building, and that Wilkins, associated with one
of Dawson & Thayer in telephone, and made an appoint-
ment to go and see the property; that on the 17th day
Thayer came and took Davies in his automobile; that
they went to the property; that on the way

he drove Thayer out to the property; that he, himself, is a licensed realtor; that he and Thayer went over the property; that Thayer told him, his man wanted $95,000.00 for it; that he, Devine, said "The price looks all right;" that Thayer said, "He wants $40,000.00 cash;" that he, the witness, said, "Well, I won't pay $40,000.00 cash * * * I don't want to tie up that much cash. I would consider around fifteen to twenty thousand dollars cash;" that Thayer said, "Well, they won't consider it unless you buy on contract;" that he said, "Well, I never bought a piece of property on contract * * * I want a deed;" that Thayer said, "Well, I don't know. I don't think this man will consider it," and Devine said, "You take it up with him and let me know;" that he never heard from Thayer about it afterwards. He further testified that when Wilford submitted the building to him, he said to Wilford, "I know that building," and when Wilford asked him what he knew about it, he said, "Well, the man wants to sell on contract, and I wouldn't buy that property without a deed if I put up $20,000.00 cash;" that Wilford said, "If I work out a deal will you consider it?" and he told him he would; that he did not know how Wilford came to show him about the building; that Wilford submitted the building to him about a week or ten days after Thayer had done so; that the deal was worked out. On cross-examination, he testified that Thayer said he did not think the building could be gotten without $35,000.00 cash; that he did not recall whether Thayer said he would submit his, the witness' proposition; that Wilford submitted other buildings to him at about the same time, one of which he purchased; that he told Wilford, about the proposition, telling him about what he told Thayer. He

testified, also, that he did not tell Sunderman that Thayer had shown him the property. He further testified that the deal was closed about May 15, 1924.

The defendant, Wilford, testified that he had been in the real estate business continuously for fifteen years; that he was formerly connected with a company at 929 Stock Exchange Building; that from April 1, 1924 until December, his office was at 4420 Michigan Boulevard; that he took over the management of a hotel, which matter he worked on from April 1 to April 20; that then he got an assistant and undertook to rebuild his real estate business; that, driving around with a coal man, he saw the property in question and rang the bell and asked for the owner; that he got Sunderman's name and address from some one in the building; that he then went to Sunderman's, that afternoon, and got the listing of the property; that he tried to sell it to three or four different people; that he submitted it, along with four other pieces, to Devine; that altogether he had submitted over 300 buildings to him, and had sold him four different pieces. He further testified that when he submitted it to Devine, thelatter said, "Well, I know about that property;" but "you can't deliver the property;" that he told Devine that he would go out and see if he could; that Devine said he had $15,000.00, or $20,000.00 cash, and if the owners would take back a mortgage of $15,000.00 he would give $20,000.00 in cash; that he, the witness, said he would submit the offer; that he talked with Sunderman three or four different times, but first submitted Devine's name when he took Sunderman over to Devine's office; that that was the day

before the contract was made; that he had already told Sunderman the terms, $20,000.00 cash and a mortgage for $75,000.00 and Sunderman had said he would consider it; that he saw Sunderman at the trader's Exchange and told him to go to his lawyer's office and have a contract drawn; that Sunderman did so, the contract being drawn by Jarrett, and, accordingly, the next day, at Jarrett's office, the money was put up by Devine and the contract signed, and both put in escrow in the Chicago Title and Trust Co.; that there was some talk about commission and he, the witness, agreed to accept $2,000.00 when the deal was consummated; that the deal was closed about May 1.

On cross-examination, he testified that a coal man named Henning or Hennessey, who worked for the Consumers Company, whom he met at room 750, 29 South La Salle Street drove him out to the building; that he submitted the property to Devine about three days prior to the making of the contract; that he had some other clients, on another proposition, on the same property; that Sunderman did not submit the property to him on any terms at all, but said he would like to sell it on a contract; that he, the witness, said to him, "I can't sell it on a contract;" that Sunderman waived that proposition; that he then asked him, "How much cash do you want?" and Sunderman said, "All the cash you can get;" that he, the witness, asked, "Will you take a mortgage back?" and he said, he would, that they talked pro and con for three or four hours; that he, the witness never sold property on a contract, except vacant lots.

a contract, except a court loan.

on that point, that he, the witness never sold property on any mortgage, that they either paid up promptly as they said they would, or else renewed it for three or four years, that they either paid the cash for the property or else executed a contract for a deed, and Gundersen said, "All the cash you can get from me?" and Gundersen said, "All the cash you can get." that he, the witness, replied, "Will you take a mortgage back?" that Gundersen then said he would consider it; that he saw Gundersen at the trader's Exchange and told him to go to his lawyer's office and have a contract drawn; that Gundersen did so, the contract being drawn by Ferrell, and, accordingly, that next day, at Ferrell's office, the money was put up by Davies and the contract signed, and both put in escrow in the Orange Title and Trust Co.; that there was some talk about commission and he, the witness, agreed to accept $2,000.00 when the deal was consummated; that the deal was closed about May 1.

On cross-examination, he testified that a coal man named Bentley or Hennessey, who worked for the Consumers Company, whom he met at room 1520, 22 South La Salle Street, had put him to the building; that he submitted the proposition, on the same paper; that Gundersen did not submit the property to him on any terms at all, but said he would like to sell it on a mortgage; that he, the witness, said to him, "I won't sell it on a contract;" that Gundersen waived that statement; that he then said, "How much cash can you raise?" and Gundersen said, "All the cash you can get;" that he, the witness, replied, "Will you take a mortgage back?" that Gundersen said he would consider it; that $25,000.00 and Gundersen had said he would consider the terms, $20,000.00 cash and a mortgage for before the contract was made; that he had already told

It will be seen from the foregoing that the crucial question is one of fact, that is, who was the procuring cause of the sale; who "actually brought about a consummation of the sale." Day v. Porter, 161 Ill. 235. In Sheppard v. Cade, 227 Ill. App. 110, the court said, in a case somewhat similar to this,

> "When two brokers are employed and one of them enters into negotiations with the purchaser which fail and are abandoned, he will not be entitled to a commission because another broker subsequently succeeds, wholly through his own efforts, in making a sale to the same person." (Citing Mechem on Agency, 2242, 2456 and 2459, and McGuire v. Carlson, 61 Ill. App. 295).

A similar principle is announced in Rigdon v. Strong, 128 Ill. App. 447; McGuire v. Carlson, 61 Ill. App. 295; Patten v. Willis, 134 Ill. App. 645, and Bergman v. F. S.B. & L. Assn. of Chicago, 169 Ill. App. 339. In the McGuire case, the court said,

> "It is manifest that the plaintiff did not at any time he saw or communicated with Mr. Spencer, procure a customer ready or willing to purchase. Nor is there any evidence tending to show that Mr. Spencer would have purchased, had no further effort to sell to him been made by anyone. * * * It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or the second who engaged the attention of thepurchaser." Citing Mechem on Agency, Sec. 969; Vreeland v. Veterlein, 33 N.J.L. 247; and Sibbald v. Bethlehan Iron Co., 87 N.Y.378.)

There is nothing to the contrary in Hafner v. Herron, 165 Ill. 242, nor in Cowan v. Day, 156 Ill. App. 105. In the instant case, although Thayer first called Devine's attention to the property, and had done some work in the way

It will be seen from the foregoing that the crucial question in one of fact, that is, who was the procuring cause of the sale; who "actually brought about a consummation of the sale." May v. Porter, 181 Ill. 288. In Townsend v. Cade, 227 Ill. App. 170, the court said, in a case somewhat similar to this:

"When two brokers are employed and one of them enters into negotiations with the purchaser which fail and are abandoned, he will not ordinarily be entitled to a commission because another subsequently succeeds, wholly through his own efforts, in making a sale to the same person." (Citing Gordon on Agency, Sec. 1416 and 1418, and Hopkins v. Brigham, 61 Ill. App. 639).

A similar principle is announced in Hinton v. Tenney, 188 Ill. App. 647; Watkins v. Watkins, 194 Ill. App. 646, and Peterson v. L.B.& S.C. Corp. 198 Ill. App. 288. In the Hinton case, the court said,

"It is manifest that the plaintiff did not at any time be one or communicated with Mr. Spencer, procure a customer ready or willing to purchase. Nor is there any evidence tending to show that Mr. Spencer would have contracted, but he [illegible] effort to sell to his duly made by defend- It is not the broker who first speaks of the pro- perty, he be who is the procuring cause of the sale, he be the first or the second who engages the attention of the purchaser." (Citing Hopkins on Agency, Sec. 1418) Tenney v. Hamilton, 84 N.Y.S. 629; and Campbell v. Whitaker Iron Co., 67 N.Y.S.278.)

There is nothing to the contrary in Hilmer v. Herron, 188 Ill. 548, nor in Brown v. Orr, 198 Ill. App. 108. In the instant case, although Draper first called Devine's attention to the property, and had some conversations with him about it, Devine did not enter into negotiations with Draper for the purchase of the property, and had some conversations with Draper's competitor, Hamilton, before Draper had any conversation with Devine. Hamilton was the first to submit a definite proposition to Devine, and Devine's acceptance of Hamilton's proposition was the result of negotiations between Devine and Hamilton, and not between Devine and Draper. Hamilton was the procuring cause of the sale, and Draper was not.

of endeavoring to sell it, such as advertising it for sale, yet, a careful scrutiny shows that after his talk with Devine, on April 17, in which he said, according to his, Thayer's testimony, that Sunderman would probably give him a contract on $10,000.00, and in which Sunderman said he would not buy without a deed, he did nothing further, but left everything in fieri. It is true that Mary, Thayer's daughter, and clerk, stated that after April 17, Sunderman called and said he had some one who was interested, and that she told him that her father had shown it to some one who was interested, and promised to make an offer, but had not done so, and that Sunderman said not to give up, although he thought his deal was going through. That, however, does not show that Thayer was the procuring cause. In its essence, it shows that Thayer's office was informed that Sunderman was negotiating with some chance of success through another broker for a sale of the property. It did not in any way show that Devine was being convinced and persuaded by Thayer to buy.

At that time Sunderman did not know that Thayer had shown the property to Devine. When Wilford took the matter up, he got new terms from Sunderman, and such as were satisfactory to Devine. Thayer did not present an acceptable proposition to Devine. It may well be that if Thayer had solicited Sunderman, as Wilford did, that he would have been successful, and up transmission of the new terms to Devine, would have become the procuring cause. As the evidence stands, however, bearing in mind the fact that the Chancellor heard and saw the witnesses we do not feel justified in overriding the decree. It is

as to not lose jurisdiction in executing the decree. It is in mind the fact that the Chancellor heard and saw the witness personally cause. In the evidence showed, however, material inconsistencies of the men terms to Devine, would have caused the Chancellor to disbelieve Devine. Upon Clifford took the matter upon the authority to Devine. Upon Clifford took the matter ab, he did not terms from Dunbarton, and such we were satisfactorily to Devine. It may well be that if Draper had motivated Dunbarton with not to give up, although he thought his deal was fair enough. That, however, does not show that Draper was the knowledge cause. In the contrary, it shows that Draper's client was informed that Dunbarton was negotiating with some chance of success through another broker for a mile of the Lateral. It did not in any way show that Devine was personally to blame for Draper to put.

At what time Dunbarton did not know that Draper had found suitable to buy it, such to advertising it for sale, or announcing to sell it, such as advertising it for sale but with Devine's on Hwy 12, in which he would, according to him, Draper's client's deal, in its nothing further, but lack everything Draper had done. It is true that Mary, Draper's daughter, and Draper. It is true that Draper's client was told his that be find from the and interested, and that she told his that clear, after that after April 12, Dunbarton called and said Draper's client was interested, but had not done so, and that Dunbarton with not to give up, although he thought his deal was fair enough. That, however, does not show that Draper was the knowledge cause. In the contrary, it shows that Draper's client was informed that Dunbarton was negotiating with some chance of success through another broker for a mile of the Lateral. It did not in any way show that Devine was personally to blame for Draper to put.

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true that there are some discrepancies and difficult conflicts in the evidence, yet, we feel bound, upon the face of the record, to support the decree.

It is urged that Wilford was not a licensed broker at the time in question. That matter, however, is not here involved. This is a bill in the nature of an interpleader, and no question is raised as to the jurisdiction of the court. Noble v. Carruthers, 235 Ill. App. 1. Thayer is bound to show a right in himself to the fund or stake. It is not here a question whether Wilford has a right, but whether Thayer has. Whether or not Wilford had a license, is a matter of importance only as between Sundermans and him, and they are not disputing it; and even if they did, and successfully, Thayer would not profit, unless he showed that he was the procuring cause. If Wilford was not licensed, but was the procuring cause, it would not follow that Thayer, being licensed but not the procuring cause, could recover. Thayer's rights depend upon what he did, and not upon what Wilford did not do in the way of getting a license. Not being the procuring cause, Thayer is not entitled to recover.

For the foregoing reasons the decree is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

of the record, to support their case.

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It is urged that Wilford was not a licensed broker at the time in question. What matter, however, is not here involved. This is a bill in the nature of an interpleader, and no question is raised as to the jurisdiction of the court. Hobbs v. Dettenborn, 259 Ill. App. 2. There is bound to show a right in himself to the fund or stake. It is not here a question whether Wilford had a right, but whether Thayer has. Whether or not Wilford had a license, is a matter of importance only as between Buckeridge and him, and they are not disputing it and even if they did, and successfully, Thayer would not profit, whether he showed that he was the procuring cause. If Wilford was not licensed, but was the procuring cause, it would not follow that Thayer's rights depend upon what he did, and not upon what Wilford did not do in the way of getting a license. Not being being licensed *but* not the procuring cause, could recover. the procuring cause, Thayer is not entitled to recover.

For the foregoing reasons the decree is affirmed.

O'CONNOR, P. and THOMSON, J., concur.

AFFIRMED.

508 - 30772

TIMES SQUARE AUTO SUPPLY COMPANY, Inc., a corp.,

Appellee,

v.

HOWARD F. LEOPOLD,

Appellant.

243 I.A. 603

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 6, 1923, the Times Square Auto Supply Company, a corporation, plaintiff, brought suit in the Municipal Court against the defendant, Howard F. Leopold, the defendant, on three checks; and upon a trial before the court, with a jury, recovered a verdict and judgment in the sum of $1,420.00. This appeal is from that judgment.

The chief question in the case is whether the trial judge erred in refusing to permit the defendant to file an amended and supplemental affidavit of merits.

The statement of claim was filed on January 6, 1923. It set up three checks, given for the purchase of certain merchandise, which were signed by the defendant and payable to the plaintiff; that they were owned by the plaintiff; that they had been presented for payment, and payment refused.

The appearance of the defendant was filed on May 5, 1923. An order was entered extending the defendant's time

TIMES SQUARE AUTO SUPPLY COMPANY,
Inc., a corp.,
Appellee,
v.
EDWARD P. LEDYARD,
Appellant.

Opinion filed Oct. 12, 1932.

MR. PRESIDING JUSTICE LATHAM delivered the opinion of the court.

On January 6, 1932, the Times Square Auto Supply Company, a corporation, plaintiff, brought suit in the municipal court against the defendant, Howard P. Ledyard, the defendant, on three counts and upon a third bill of exchange, with a jury, returned a verdict and judgment in the sum of $1,480.00. Title appeal is from that judgment.

The chief question in the case is whether the trial judge erred in refusing to permit the defendant to file an amended and supplemental affidavit of merit.

The statement of claim was filed on January 8, 1932. It is not an ideal one, filed for the purpose of certain recommendation, which were signed by the defendant and purple to the plaintiff; that they had been presented for payment, and payment refused, that they had been protested for nonpayment, and payment refused.

The statement of claim was filed on January 8, 1932. An order was entered extending the defendant's time

to file an affidavit of merits to May 25, 1923. On that date, the defendant filed an affidavit of merits, the contents of which, however, did not make out a defense to the cause of action set forth in the statement of claim. On May 29, 1923, pursuant to an order entered that day, the defendant filed a jury demand. Nothing further was done in the case for a little over two years, that is between May 29, 1923, and July 8, 1925. On the latter date, the case came up for trial before Judge Chapman, and the defendant then moved the court, both parties being present, to be allowed to file an amended and supplemental affidavit of merits. On the ground that the cause had been pending since January 6, 1922; that it had been continued at the request of the defendant, on May 7, 1925, May 21, 1925, and June 30, 1925, and had been set for trial on July 8, 1925, with the agreement by the defendant that it would be tried on that day; that the amended and supplemental affidavit of merits, if filed, would compel the plaintiff to take depositions of witnesses in New York City, in order to make proof of the issues attempted to be created by the amended and supplemental affidavit of merits, which would necessitate a continuance of said cause until the beginning of jury trials in the Municipal Court in the fall months of the year 1925, as jury cases are not tried in that court between July 15, and September 15; that said motion came as a surprise to the plaintiff and would cause a further continuance of said cause, Judge Chapman denied the motion. On the same day, the cause was transferred by the Chief Justice to Judge Viner. The motion was renewed and argued and again denied. The cause was then tried before a jury,

as stated above, and witnesses were called by both sides, and evidence introduced, and at the close of all the evidence, each side moved for a directed verdict. Both motions were overruled.

In view of the reasons given by the two trial judges for overriding the defendant's motion to file the amended and supplemental affidavit of merits, we are not persuaded by the briefs of counsel that such ruling was an abuse of discretion. The number of continuances, the lapse of time, the agreement that the cause should be tried on July 8, 1925, the fact that if the motion was granted there would have to be further delay in order that the plaintiff could take depositions, constitute sufficient reason to justify the ruling, unless it is shown that important matters of defense had recently come to the knowledge of the defendant, and that by reasonable conduct they could not have been discovered earlier. Fisher v. Greene, 95 Ill. 94; Phoenix Ins. Co. v. Stocks, 149 Ill. 319; City of Chicago v. Cook, 204 Ill. 373. But the proffered affidavit contained no such excuse; nowhere is it stated when the defendant first learnedof the facts which it is claimed constitute a defense. The original affidavit of merits was filed on May 25, 1923, and the motion to file the amended and supplemental affidavit of merits was not made until July 8, 1925, and yet in the latter affidavit no effort is made , and no substantial reason is given to show why the alleged new grounds of defense were not present earlier. As the court said in the Cook case, supra, "The correct rule of practice in a case of this character was indicated in Millikin v. Jones, 77 Ill. 372, in which it

In view of the reasons given by the two trial judges for overruling the defendant's motion to file the amended and supplemental affidavit of merits, we are not persuaded by the briefs of counsel that this ruling was an abuse of discretion. The number of continuances, the lapse of time, the statement that the cause should be tried on July 8, 1922, the fact that if the motion was granted there would have to be further delay in order that the plaintiff would have deposition, constitute sufficient reason to justify the ruling, unless it is shown that important matters of defense had recently come to the knowledge of the defendant, and that by reasonable conduct they could not have been discovered earlier. Kinder v. Greene, 98 Ill. 241; Phoenix Ins. Co. v. Pindar, 120 Ill. 259; Duty of Owners v. Cook, 204 Ill. 252. But the proffered affidavit contained no such excuse; nowhere is it stated when the defendant first learned of the facts which it is claimed constitute a defense. The original affidavit of merits was filed on May 22, 1922, and the motion to file the amended and supplemental affidavit of merits was not made until July 8, 1922, and yet in the latter affidavit no effort is made to explain why defense could not have been set up earlier. As the court said in the Cook case, supra:

"The general rule of practice in a case of this character was indicated in Illinois v. Jones, 11 Ill. App. 2, in which it was stated that for a strong affidavit of merits to open up the alleged new grounds of defense were not sufficient, and no explanation reason is given why such grounds were not made known earlier, and yet in the latter affidavit of merits and evidence introduced, out of the mouths of all the witnesses, it was stated that witnesses were called in July 1922."

was held, where a defendant, after filing the general issue, and the continuance of the cause, discovers that he has a substantial defense not admissible under the general issue, he should at the earliest convenient day ask for special leave of the court to file an additional plea, so as not to take the plaintiff by surprise or delay the business of the court." Dow v. Blake, 148 Ill. 76; Page v. Hallam, 212 Ill. App. 462; O'Malley v. Illinois Publishing and Printing Co., 194 Ill. 544. There is nothing to the contrary in Clark v. Wisconsin Central Railway Co., 261 Ill. 407. In that case the court said that there was nothing appearing in the record to indicatethat delay would be necessary if a plea were allowed to be filed. In the instant case, the record shows that it would have been necessary to put the trial off until the depositions of witnesses in another jurisdiction were taken.

The proffered affidavit of merits contains twelve paragraphs. Paragraph one contains allegations that are merely a repetition of part pf the original affidavit. Paragraph two and three duplicate parts of the original affidavit of merits and add matters that do not even, if proven, constitute a defense. Paragraph four and five contain a counter-claim and are improper in an affidavit of merits. Paragraph six is immaterial. Paragraph seven is based entirely on information and belief and does not purport to state any facts as true. Further, it states that defendant was apprised, but does not state when. Paragraph eight is merely an argument, and contains no statement of facts. The first part of paragraph nine is immaterial, and the latter part is based on information

is immaterial, and the latter part is based on information and belief and does not state any facts on true. Further, it states that defendant was advised, but does not state when. Paragraph eight is merely an argument, and counts as no statement of facts. The first part of paragraph nine purports to state any facts on true. Further, it states is based entirely on information and belief and does not state. Paragraph six is immaterial. Paragraph seven contain a counter-claim and are improper in an affidavit to obtain a dismissal, constitute a defense. Paragraph four and five, it admits of merits and such matters that do not even" merely a repetition of part of the original affidavit. Paragraph two and three duplicate parts of the original paragraph one contains allegations that are hearsay. Paragraph one contains allegations that are

The proffered affidavit of merits contains twelve of witnesses in another jurisdiction were taken.

been necessary to put the trial off until the depositions in the instant case, the record shows that it would have would be necessary if a plea were allowed to be filed, nothing appearing in the record to indicate any delay 111. 407. In this case the court said that there was contrary in Clark v. Minnesota Central Railway Co., 82 Fed. Rep. 406; Kellogg v. Illinois Publishing and Printing Co., 194 Ill. 864. There is nothing to the of the court." Dow v. Hicks, 149 Ill. 76; Dean v. Dolton, 178 Ill. to take the plaintiff by surprise or delay the business leave of the court to file an additional plea, so as not be placed at the earliest convenient day set for special ment the continuance of the cause, discovers that he has a substantial defense not available under the general issue, was held, where a defendant, after filing the general issue,

and belief and fails to state facts. Paragraph ten does not state sufficient facts to constitute a defense. Paragraph eleven is subjectto the same criticism as paragraph ten. Paragraph twelve is similar to the two just mentioned. Taking the proffered affidavit as a whole, and considering what it contained in addition to what was set up in the original, it may be said to be an effort to introduce purely technical defenses, none of them based on the merits and substance of the case.

We are of the opinion that the trial judges did not err in refusing to permit the filing of the amended and supplemental affidavit.

It is urged that at the trial the court erred in admitting the three checks in evidence, because when offered in evidence they showed an endorsement of the Times Square Auto Supply Co. to the order of the Chatam and Phoenix National Bank Consolidated Distribution, Incorporated, to the credit of three persons, receivers. The only objection made to their introduction was that they were not in the same condition they were at the time of their execution. That objection was not good. All three of the checks were signed by the defendant and were payable to the plaintiff, and it is not denied in the affidavit of merits that the plaintiff was theowner of them; no question of title or right to sue was in issue. The plaintiff alleged in his statement of claim that he was the owner, and that was not denied. Every holder of a negotiable instrument is <u>prima facie</u> deemed a holder in due course, and the possession and production of such an instrument at a trial con-

stitutes prima facie evidence of ownership and title. Bank of America v. Bank of Illinois, 164 Ill. 503. Section 59, Chap. 98, Cahill's Rev. Stats. 1923.

It is urged that the court erred in giving two instructions. But they were given for the defendant and for his advantage, and further, no objections were made to them.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. and THOMSON, J. CONCUR.

517-30781.

243 I.A. 603

ADELA REIVITZ, APPELLEE, vs. CHICAGO RAPID TRANSIT COMPANY, APPELLANT.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an action on the case in the Superior Court, by Adela Reivitz, the plaintiff, against the Chicago Rapid Transit Company (successor to the Northwestern Elevated Railway Corporation), for damages for injuries alleged to have resulted from the negligence of the defendant in the maintenance of a stairway at the Thorndale Station. The case was tried before the court, with a jury, and a verdict and judgment rendered in favor of the plaintiff in the sum of $1500.00. This appeal is therefrom.

On July 22, 1925, the plaintiff filed a declaration alleging that the accident in question took place at the Argyle Station of the defendant's railroad. To that declaration, the defendant pleaded the general issue. On December 24, 1925, the plaintiff filed an amended declaration in which the locus in quo was alleged to be the Thorndale Station on the defendant's railroad.

The amended declaration consists of two counts.

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Thereafter station on the defendant's railroad.

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December 26, 1892, the plaintiff filed an amended declara-

tion alleging that the accident in question took place

at the Argyle Station of the defendant's railroad. To that

declaration, the defendant pleaded the general issue. On

November 28, 1893, the plaintiff filed a joinder

in the plaintiff in the sum of $1500.00. This appeal is

thereupon.

On July 25, 1892, the plaintiff filed a declara-

tion, and a verdict and judgment rendered in favor of

Jury, with a statement. The cause was tried before the court, with a

dant in the maintenance of a stairway at the Thorndale

alleged to have resulted from the negligence of the defen-

Elevated

vester Railway Corporation), for damages for injuries

Chicago North Western Railway Company (successor to the North-

Court, by Adela Neivitt, the plaintiff, against the

Opinion of the Court.

Mr. JUSTICE BAKER delivered the

Opinion filed Oct. 18, 1898.

ADELA NEIVITT,	
Appellee,	
v.	
CHICAGO NORTH WESTERN RAILWAY COMPANY,	
Appellant.	

SUPERIOR COURT.

COOK COUNTY.

2431.A. 603

STATEMENT.

The first alleged that on January 8, 1922, the plaintiff became a passenger for hire on one of the defendant's trains; and got off at the Thorndale Station; that the defendant carelessly and negligently had permitted one of the steps of the stairway leading down from the station platform to the street, to be and remain in an unsafe condition; that it had carelessly and negligently permitted a nail or spike used in the construction of the stairway to project or protrude above the surface of the step, and had carelessly and negligently neglected to keep the stairway and landing sufficiently lighted so that the plaintiff could see the nail or spike; all of which facts the defendant knew or could have known if it had exercised ordinary or reasonable care; that while she was descending - it being night time - and while she was in the exercise of ordinary care, by reason of the defendant's negligence, she struck the heel or some other part of one of her shoes against the nail or spike which protruded above the surface of the step, and owing to defendant's negligence she fell down a number of the steps of the stairway and was injured; that by due care and diligence the defendant would, then and long before, have known that the stairway was not properly cared for and was not in a reasonably safe condition to be used by its passengers.

The second count adds to the substance of the first count and alleges that, prior to the time of the accident, the defendant carelessly, negligently and improperly constructed

The first alleged that on January 8, 1968, the plaintiff became a passenger for hire on one of the defendant's trains; and got off at the Thorndale station; that the defendant carelessly and negligently had permitted one of the steps of the stairway leading down from the station platform to the street, to be and remain in an unsafe condition; that it had carelessly and negligently permitted a nail or spike used in the construction of the stairway to project or protrude above the surface of the step, and that carelessly and negligently neglected to keep the stairway and landing sufficiently lighted so that the plaintiff could see the nail or spike; all of which facts the defendant knew or could have known if it had exercised ordinary or reasonable care; that while she was descending - it being night time - and while she was in the exercise of ordinary care, by reason of the defendant's negligence, she struck the heel or some other part of one of her shoes against the nail or spike which protruded above the surface of the step, and owing to defendant's negligence she fell down a number of the steps of the stairway and was injured; that by due care and diligence the defendant would, then and long before, have known that the stairway was not properly maked for and was not in a reasonably safe condition to be used by the passengers.

The second count like to the substance of the first count and alleges that, prior to the time of the accident, the defendant carelessly, negligently and incorrectly constructed

and built the stairway, steps and landings leading from the station platform, which were the only means of egress, and negligently used old material and wooden planks in their construction, and negligently fastened them with old defective nails or spikes, and negligently failed to fasten the nails or spikes securely; that at the time in question, the defendant negligently permitted one of the nails or spikes to project or protrude above the tread or surface of one of the steps of the stairway, and negligently permitted the premises about the stairway to be poorly and inadequately lighted. The ad damnum was $2,000.00. The defendant having filed a plea of the general issue to the original declaration, it was ordered that it should stand as a plea to the amended declaration.

At the trial, the occurrences constituting the alleged accident were related on behalf of the plaintiff, by three witnesses; the plaintiff, Adela Reivitz; Mrs. Jane Mittelman, a daughter-in-law; and B. E. Mittelman, a son of the plaintiff. The evidence of the plaintiff, a woman 58 years old, about five feet tall, weighing 185 pounds, is that near midnight on Sunday, January 8, 1922, she got off a train of the defendant at the Thorndale Station, and started down the stairway to the street; that the stairway was not lighted very well, but she could see; that when she got on the second step, she stepped on something hard, "I tripped on something hard on my feet;" that her heel caught on something hard, and she fell. On cross-examination she said that she had had nine children; had had all her teeth out, but had been well all her life.

fit her life.

The evidence of the son is that on the night of the accident, his mother, his wife and he went to the Chicago Theatre and when it was over, took a train of the defendant to the Thorndale Station; that they got off there and started to go down the stairs; that his mother was on the right hand side of the stairway; that there was no railing on that side, but some planks for siding; that the light at the head of the stairway was somewhat dim; that the platform was dry; that as his mother started down and was on the second step, she tripped and fell down twelve steps to the first landing; that with the assistance of others, he picked her up and carried her down to the station; that she fainted, and when laid down was unconscious for about three minutes; that at the time there was a station agent there preparing some coffee or food, with another man; that he did not render any assistance; that the only conversation he, the witness, had with the station agent was when he asked him for some water and told him that they ought to repair the stairs, but that he made no reply; that he did not take any names of witnesses at the time; that at the time the plaintiff fell, he did not notice the condition of the stairway, although there were nails sticking up; that the next morning, he examined the step where the plaintiff fell and saw a nail protruding from the second step about a foot and a half from the right-hand side and about an inch to an inch and a half from the edge of the step; that it was not sticking straight up, but from a horizontal position; that the tip of the nail was sticking up about half an inch above the surface of the step and was right in the step itself; that he kicked the nail about 15 times to get it out, broke it

off, and got it; that it was not movable but he had to kick it about 15 times, and then broke it off; that the steps were about 6 or 7 inches high, and the part you step on, a foot to a foot and a half wide, and the surface of each step protruded over the bottom of the next one.

On cross-examination, he testified that the plaintiff went down in the usual way, one foot on one step, and the other foot on the next; that as she fell, her head went down before her feet, and she slid clear down head first, to the first landing; that she weighed about 185 pounds and he and the other men had considerable work in picking her up; that the ticket agent did not come over, but stood and watched like a numbskull and said nothing; that when he went back the next day, he looked for the step which his wife told him the nail was on; that while he was kicking it a few persons came out but he did not ask any of them for his name; that he threw the nail in his desk simply because he wanted to keep it as you would keep a tooth that has been pulled out; that, in keeping it, he had no thought of a lawsuit; that, afterwards, he took it over to his lawyer; that he did not see the nail until about 9:15 the morning after the accident; that he had been using those steps for about six months.

The daughter-in-law of the plaintiff, and wife of the preceding witness, testified that the train arrived at the Thorndale Station about midnight; that they got off the train and started down the stairs, the plaintiff, first, the plaintiff's son, next, and the witness, last; that she suddenly saw the plain iff fall forward and that her

husband tried to catch her, the plaintiff; that at the time the plaintiff fell she was about at the second step; that she fell all the way to the first landing; that the light on the stairway was very dim; that her husband jumped down after the plaintiff and she, the witness, looked down to see where the plaintiff fell; that there was something protruding from the steps which she believed was a nail; that she bent over and looked; that it was on the second step about two feet from the right or east end of the step; that after the fall, the plaintiff was placed on the floor and was unconscious and came to in about five minutes. She testified further, that the cashier was in the cage of the station and she told him that it was about time they had the steps, there, fixed; that it was a wonder somebody did not break his neck; that the cashier did not say anything; On cross-examination, she testified that the plaintiff was towards the east or right-hand side going down, and was in the lead; that she, the plaintiff, put one foot on the stair and then stepped on the next step below; that she could see the plaintiff's position; that the plaintiff fell very suddenly; that she went over, head down, on her hands and a little to the left, falling from the second step to the landing, which was about half way down the stairs; that it sort of jerked her over; that she saw her jerking over just as her husband tried to catch her; that she was struck dum with fright; that it did not take more than a minute for her to stop to see the nail after her mother had fallen; that the nail was towards the front of the tread, which was an old plank; that it was an old, large, bent

which was an old block; that it was an old, large, pond
yellow; that the wall was towards the front of the trees,
minute for her to step to and the wall after her mother had
entered dim with light; that it did not take more than a
over just as her husband tried to catch her; that she was
that it sort of jerked her over; that she saw her jerking
the inertia, which was about half way down the stairs;
and a little to the left, falling from the second step to
very suddenly; that she went over, head down, so her house
could see the plaintiff's position; that the plaintiff fell
the stair and then stepped on the next step below; that she
in the head; that she, the plaintiff, put one foot on
towards the east or right-hand side going down, and was
cross-examination, she testified that the plaintiff was
pin room; that the counter did not say anything; on
there", fixed; that it was a counter somebody did not first
and she told him what it was about time that she put the stone,
further, that the counter was in the edge of the station
connections and came to in about five minutes. The testified
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two feet from the right or west end of the step; that after
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she fell all the way to the first landing; that the lights
that the plaintiff fell she was about at the second step; that
husband tried to seize her, the plaintiff; that at the time

nail and protruded above the tread about a half or three-quarters of an inch; that she could not see the head of the nail; that it must have been inside; that she did not look that closely; that the head of the nail was evidently inside of the board that it was driven through and was bent over. The nail was produced and put in evidence.

For the plaintiff, there was offered in evidence three photographs of the stairs or parts of them, which were taken on February 14, 1922, thirty-seven days after the accident. Exhibit 6 purported to be of the first two steps, including the one from which the plaintiff fell. Miller, the photographer, testified that the step looked as if it was constructed of old material, of wooden planks; that he made an inspection of the markings on the second step, and there were, as well as he could remember, nail holes, as if nails had been taken out.

Evidence for the plaintiff was offered to show that the fall caused a fracture of the radius of the right arm, and a consequent displacement of the bones of the right hand; and, apparently, a similar injury to the left hand.

For the defendant, the following witnesses testified; Pocinek, the ticket agent; Smith, assistant electricial engineer; Lorenz, clerk in the claim department; Tannhauser, traveling auditor; Osborne, station porter; Anthon, superintendent of construction; Wills, station inspector; Moore, a carpenter foreman; and one Preaskil.

Pocinek's evidence is that he was employed by the

defendant at the time as ticket agent, and on the evening in question he heard some people come in who laid a woman on the floor, in back of the ticket office; that he asked what was the matter; that a woman asked for a glass of water; that he gave it to her, and she said, "Nothing at all, just a little fainting spell that I am accumstomed to have;" that he asked for her name and she said it was not necessary; that no names were given him, though asked, they refused; that she was on the floor about five minutes and then helped out by a man and a woman, taken away in a taxicab; that he was preparing something to eat, and there was a watchman present; that he made no report of the matter; that it was his duty to do so if anything happened; that no one made any complaint about the steps; that the woman was not unconscious. On cross-examination, he testified that when he asked if anything happened, the man replied, "Just a little fainting spell she was accustomed to have." On rebuttal, this was denied by Mrs. Mittelman.

Smith's evidence is that on the north bound platform there was a light at the top of the stairs, two lights under the canopy roof, on the upper flight; that there were lights on the lower flight; that in the trouble report, kept in the office, there was no record of any such lights being out of condition on the night in question; that there were two circuits, and if the top stairway light was out it would put out all the other lights on the way down.

Lorenz's evidence is that there was no record on

file of any accident at that station between July 21, 1921 and July, 1922. Tannhauser's evidence is that in January, 1922, an average of 2000 persons passed through the Thorndale Avenue Station per day. Osborne's evidence is that as porter he swept the station on the day in question; that he swept the stairs from top to bottom, three times; that he saw no protruding nail; that although it was his duty to report any bad condition, he made no report.

Anthon's evidence is that the station was built in the fall of 1915 and remained there until the latter part of 1922, when it was dismantled; that the 1915 station was of wood and had stairways that were new, with treads of one 2 x 6 and one 2 x 4, making a ten inch tread; that the stair was 5 feet 2 inches wide; that if there were any replacements of the treads, new lumber was used, and no step turned. When asked, "Did you use old lumber in the construction of the stairway at Thorhdale?" he said, "The supports were old." Will's evidence is that he inspected the station every day from 1917 to 1923, and never saw any nail protruding above the tread of the second step.

Moore's evidence is that he took part in the construction of the station in 1915 and 1916; that the lumber used was Western Pine, which is fairly hard; that about the time in question, he visited the station about once a week and never saw any nail protruding above any of the treads; that the nail in evidence was a twenty penny nail; that he and his men repaired the stairs on November 18, 1921; that he did not use new lumber; that he could not say that he did not turn them over on the first and second steps.

life of the occupant is upon expiration January 31st, 1933 and
July, 1933. Lessee's estimate is that in January, 1933,
it receipts of less business through the Terminals
lease clauses for 5%. Lessee's estimate is only on
basis to make the statistic of its 5% is material. That
be valid for the period from 5% to 6%, there should be
can be considered until the 5% is reached, then 5% may be
lessee's estimate is that the statistic 5% until the
the fall of 1933 and thereafter there must be taken into
5 & 6 per cent 5 x 6" showing a loss should that the figure
ed into effect that were now, with figure of use
it then, would it was discussed; that the 1932 statistic are
mouth of the storage, are there, may be read
are 5 feet 4 inches wide; that it shall make and construc-
tenant. That rental 5% is the 5% inches is the
construction of the district 5% with
"5% square are per cft." Lessee's estimate is that an increased
the station exact for them 1932 to 1933, may store our ad-
ditional charges for the month of Jan. 1933 and 1933; that the
storage of the station on 5% and 1933; that the
Lessee's estimate is that 5% will in the
until terminated due to the event of non-renewal clause.

When asked, "Did you make any repairs to the stairs at Thorndale Avenue Station in November 1921?" he answered, "Yes." He further testified that in November 1921, the edges of the steps were worn and that he took out the worn ones and put in new steps; and when asked, "Now, as a matter of fact, you took them and turned them over?" he answered, "No, sir, not all, no, sir." When asked if he could say that he did not turn over the first and second steps, he answered, "I couldn't say."

Preaskil testified that on the night in question he got off at the Thorndale Station; that he did not see the plaintiff fall; that he saw her lying on the landing and rushed down and helped carry her downstairs; that she was unconscious for three or four minutes; that he helped carry her out, taking hold of her legs; that he saw the ticket agent and another man with him.

At the close of the plaintiff's case and at the close of all the evidence, a written motion was made to instruct the jury to find the defendant not guilty, and both motions were overruled. After the verdict, motions for a new trial, and in arrest of judgment were made by the defendant; and overruled.

For reversal, it is urged (1) that the court erred in refusing to grant defendant's motion, made at the close of the plaintiff's case, and renewed at the close of all the evidence, to instruct the jury to find the defendant not guilty; (2) that the verdict and judgment are against the manifest weight of the evidence, and the motion for a new trial should have been allowed; and (3) that, in giving erroneous and prejudicial instructions, the court erred.

We shall consider the case, first, on its

general merits. Having that in mind, two questions arise; first, was it against the manifest weight of the evidence for the jury to conclude that the plaintiff tripped on a protruding nail; and, second, was it against the manifest weight of the evidence for the jury to conclude that the defendant was chargeable with knowledge or notice of the presence of the protruding nail.

As to the cause of the plaintiff's fall, the evidence, we think, is considerable, and if the plaintiff and her witnesses are considered credible, the evidence is such that we could not reasonably say that the jury was clearly wrong in concluding that the plaintiff fell, without negligence on her part, and as the sole result of tripping on a nail protruding from the tread of the second step. The plaintiff said that she "stepped on something hard," "tripped on something hard," "caught on something hard," all of which means, when the evidence of her daughter-in-law and son is considered, that she tripped and fell by reason of something foreign to a step with a normally smooth tread. It is argued for the defendant that the nail being an inch to an inch and a half from the edge of the tread, the plaintiff's heel must have been the same distance from the edge, with the ball of her foot and toes extending beyond the edge, and that it would be impossible for any one to step from the first step to the second in that manner without falling, that is regardless of the protruding nail. That is not a scientific question of physiology and physics, but a practical situation of fact, as shown by the evidence, to be passed upon by the jury. The substance of the plaintiff's evidence is that she caught her heel on something hard and tripped and fell. That normally interpreted does not mean

that she tripped solely as the result of her foot coming in contact with the tread of the step; but considering all the evidence, it means that she fell as the result of tripping on the nail. We do not think it is just as reasonable to say she fell because her foot was too far over the tread, as to say that she tripped and fell owing to the protruding nail. The former involves a strained construction of the evidence; the latter a qui te reasonable one. In Tuthill v. Belt Ry. Co., 145 Ill. App. 50, Mr. Justice Baker quotes, with approval from 1 Starkie on Evidence, 444, as follows:

> "Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof."

Being caught on something hard and thereby tripping and falling, excludes the hypothesis that she may have tripped solely because of the normal tread of the step. We think, to use language approved by the court in Neal v. Chicago R. I. & P. R. Co. 105 N. W. 197, (Iowa), "the facts relied upon are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them." It is true that where the evidence supports equally either of two different hypothises of fact as to a cause of action, one favoring the plaintiff and the other the defendant, there can be no recovery. Jandon v. Schoenfeld, 214 Ill. 238. However, bearing in mind all the evidence in the instant case, that principle, as we have intimated above, is not here particularly involved. Nor do we think that the conclusion that the fall was caused by tripping on the nail is the sole result of conjecture or guess. If

it were, of course, it should not stand. As the court said in Scott v. Boyne City G. & A. R. Co., 135 N.W. 110 (Mich.), "The law is well settled that a case should not be submitted to the jury where a verdict must rest upon a conjecture or guess." But, here, it is not obvious that she would have fallen without striking the nail. Certainly, with the evidence as it is, it was sufficient and was proper to submit it to the jury.

Was there evidence that the defendant knew of the existence of the nail or that it had been there long enough to make the defendant chargeable with notice of its presence? Davis v. Southside Wl. R. R. Co. 292 Ill. 378. It is stated in the first count of the declaration, after alleging the existence of the nail, "all of which facts the defendant knew, or could have known had it exercised ordinary or reasonable care;" and in the second count it is stated that the stairway was negligently constructed and that old material and defective nails were used in the construction of the stairway, and that the nail was used in its construction. It is argued for the defendant that the knowledge of the existence of the nail "is apparently sought to be supplied * * * by the allegation that the same was used in the construction of the stairway by the defendant;" that "there is absolutely no evidence in this record that the nail * * * was used in the construction of the stairway, but the evidence affirmatively shows that it was not used" in its construction; that, therefore, "there can be no implication of knowledge from that source," that the nail appears to have been driven through from the underside with the point of it sticking up above the edge of the tread; that there is no evidence that it was subserving any purpose; or how long

it had been there, or who put it there; that it was not loose, and so was not one that had been used in the construction and afterwards became loose; that there was no evidence that it was put in in 1915.

It is admitted that if the nail was part of the structure it might be sufficient to charge the defendant with responsibility of having put it there or with knowledge of its existence. Being of the opinion, as stated above, that it was not manifestly against the weight of the evidence for the jury to conclude that the nail was there, sticking up through the tread of the second step, and precipitated her fall, we think, also, it follows from the evidence that the trial judge was right in submitting the evidence as to the origin of the presence of the nail to the jury, and that we are not entitled, after a close analysis of the evidence, to hold that the verdict, as far as it involved the subject of knowledge or notice, was clearly against the wight of the evidence. Moore said that he repaired the stairs in November 1921 with old lumber and that he could not say that he did not turn over the treads on the first and second steps. It was for the jury to consider all the evidence, that as to the presence of the nail sticking up, and that as to the repairs only a few weeks prior to the accident and that as to the probability of the tread of the second step being turned over and an old nail left sticking through, or in such a condition that it might become a menace and danger. True, if the tread was turned, it cannot be assumed that the defendant affirmatively put the nail there as a necessary part of the construction; but, it is not the intention that governs, but what physically was done. We cannot but conclude that there was sufficient evidence tending to show

that in the repairs made, the nail was physically there, and the defendant responsible for its presence as part of the physical structure, and, as a consequence, that the verdict, as it pertained to knowledge or notice, was not clearly against the weight of the evidence.

We think the declaration was sufficient; that the motion to direct a verdict at the close of all the evidence, the motion for a new trial, and the motion in arrest were all rightly ove ruled. As to the motion to direct a verdict at the close of the plaintiff's evidence, it may be that at that time it could be said, reasonably considered, that the evidence did not sufficiently tend to show knowledge or notice, but what was lacking was supplied by evidence given through the defendant's witness Moore, and as the defendant did not rest, but went on, it cannot now complain.

As to the instructions. It is contended that it was error to instruct the jury that "It was the duty of the defendant to use reasonable care to have and keep the steps of the stairway in question in reasonably safe condition for their intended use by passengers of the defendant." Bearing in mind the declaration, the evidence, and the issue tried, it was particularly apt that the jury should be informed of the duty which the law imposed upon the defendant; and obviously the duty referred to was in regard to the condition of the tread of the second step; there was no other object. The jury could not have understood any other negligence was referred to in the instruction than that charged in the declaration. C. C. C. & St. L. Ry. Co. v. Burrells, 115 Ill. App. 615.

It is contended that an instruction which used the words, "still, if the jury find the evidence in the case * * * preponderates in her favor, although but slightly, it would be sufficient," was erroneous, that it did not limit the finding of the jury to negligence charged in the declaration but merely required the plaintiff to prove her case by a slight preponderance. We cannot believe that the jury in this case could be misled by such an instruction. Chicago City Ry. Co. v. Bundy, 210 Ill. 39. It was obvious what the plaintiff sought to prove; what her case was.

It is true as to the words "preponderates in her favor, although but slightly," Mr. Justice Dunn, in Teter v. Spooner, 305 Ill. 198, said that the use of the adjectives "slight" and "clear," with reference to the preponderance of the evidence, is only confusing and ought not to be used; that "Nobody knows what is a slight preponderance or what is a clear preponderance of the evidence, although everyone knows what is meant by a preponderance of the evidence." O'Donnell v. Armour Curled Hair Works, 111 Ill. App. 516. Chicago City Ry. Co. v. Kastizewa, 141 Ill. App. 10. In the instant case, however, the jury were instructed in the immediately succeeding instruction, as follows: "The degree of proof required of the plaintiff in this case is that she prove her case by a preponderance of the evidence. This means that upon the questions of fact which the plaintiff is required to prove, she must have a greater weight, or preponderance of evidence * * * a fact is sufficiently proved if the jury find that the greater weight of the evidence is in its favor." That puts such emphasis on the proper requirement of a preponderance qua preponderance, without adjectival qualification, that,

although we think the instruction criticized ought not to have been given, we feel bound to hold that it did not constitute such error as to justify a reversal of the judgment.

An instruction which began with the words, "The court instructs the jury that the plaintiff's declaration in this case consists of two counts. It is alleged in the first count," etc., and which goes on and gives quite at large the allegations of the declaration, and ends without the announcement of any rule of law, is error, and in violation of Section 72 of the Practice Act. It may be doubtful if it should have been given, but taking the instructions as a series, and considering the issue and evidence, we do not feel that it is sufficient to cause a reversal. North Chicago Street R. Rd. Co. v. Polkey, 203 Ill. 225; Bernier v. Ill. Cent. R. R. Co. 296 Ill. 464; City of Joliet v. Young's, 61 Ill. App. 589; Central Ry. Co. v. Bannister, 195 Ill. 48; Liska v. Chicago Railways Co. 318 Ill. 590. The case of Attabella v. Krzepton, 233 Ill. App. 320, is distinguishable in that there the instruction criticized concluded with a direction to find a verdict.

It is contended that an instruction which stated that "facts may also be proved by circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the other evidence bearing on such facts, constitute a preponderance of evidence," constituted error; in that there may be more than one set of reasonable inferences from the same circumstances. But, even if that

were ture, the latter part of the instruction, after the word "proved," so amplifies the statement as to make it proper.

It is contended that an instruction which contained the words, "The jury should not disregard the plaintiff's testimony merely because she is the plaintiff and interested in your verdict," constituted error. The whole instruction was entirely apt. In a case where, as here, the defendant challenges the credibility of the plaintiff, it was highly proper for the jury to be instructed as it was.

For the reasons above set forth, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. SPECIALLY CONCURRING:

In my opinion the instruction which substantially copied the two counts of the declaration ought not to have been given, but upon a careful consideration of the entire record, I am constrained to say that in my opinion the judgment ought not to be reversed on account of the giving of this instruction.

THOMSON, J. DISSENTING:

In my opinion the trial court erred in giving the jury the instruction reciting the allegations of the two counts of the plaintiff's declaration. It is,

of course, one of the offices of instructions to explain to the jury what the issues are, which they are to consider and pass upon. North Chicago Street Railway Co. v. Polkey, 203 Ill. 235. But, as we endeavored to point out in Attabella v. Krzepton, 233 Ill. App. 320, this should be done "in brief and direct terms, and not in the lengthy and involved form of pleadings."

There seems to be a growing tendency to the giving of this type of instruction. As we said in the Attabella case, "in our opinion such a practice is not to be encouraged." The instruction given in the case at bar is worse than those we criticized in the Attabella case. Both in the instruction involved here and in those given in the case cited, the language followed closely the language of the respective counts of the declaration, telling the jury that the plaintiff had alleged thus and so in the counts referred to. In the instructions criticized in the Attabella case, after reciting the allegations of the declaration, the court, in a concluding clause, told the jury that "if they found from a preponderance of the evidence, under the instructions of the court, that the plaintiff had proven her case, as alleged in the counts referred to," then they might return a verdict in her favor. There is no such concluding clause in the instruction complained of in the case at bar.

In their brief, counsel for plaintiff cite the case of Central Railway Co. v. James Bannister, 195 Ill. 48, in support of this instruction, pointing out that in that case the court said that if the instructions there involved

had "copied the allegations, no objection could have been urged to them." The next sentence following that quotation shows the reason for that holding, for the court points out that "The jury had the declaration before them, and there was no difficulty in their ascertaining by reference to it, just what the charges of negligence were." Since that time it has repeatedly been held that the pleadings should not go to the jury, and it is error if they do. Counsel further argue in their brief in support of this instruction, that "in the very latest case upon this question our Supreme Court, in the case of Liska v. Chicago Railways Co., 318 Ill. 570, at page 580, in passing upon the same sort of an objection to a similar instruction, disposes of the matter in the following language: 'Each clause in the fourth instruction's recital of the allegations of the first count begins with the connective "that" and it is objected that the jury would be apt to understand that in the court's opinion, the propositions stated in these clauses were facts which had been established by the evidence. These clauses merely recited the allegations of the first count of the declaration and could not be considered as a statement of facts. * * *.'" Counsel should have continued their quotation so as to include the next and concluding clause of the paragraph quoted, in which the Supreme Court added, "in view of the concluding sentence of the instruction, which expressly stated that it was the jury's province to determine whether the plaintiff had proved his case as alleged in the count."

It will thus be seen that the instruction given in the case at bar is materially different from those involved in either of the cases referred to. The instruction presented for our consideration here, left out the part covered in the

concluding clauses of the instructions passed upon in the Liska case and commented upon in the Attebella case, which, in my opinion, was the only thing that saved the giving of the instructions in those cases, from being held to be error.

There is another material respect in which the instruction complained of here differs from those complained of in the cases cited. In those cases as pointed out by the Supreme Court in the Liska case, "each clause" in the recital of the allegations of the declaration as set forth in the instruction, began with the connective "that." Such is not the case in the instruction involved here. In the paragraph of this instruction referring to the first count, taking up thirty one lines, as it is set forth in the abstract, there are but three connective "thats," and in the second paragraph, referring to the second count, which is nearly as long, there are but two such connectives. The result is, with no concluding clause telling the jury that it is for them to determine from all the evidence whether the case of the plaintiff as so alleged, has been proven by a preponderance of the evidence, that it is more than possible that when the court, in reading the instruction to the jury, got down to the phrases, "all of which facts the defendant knew or could have known had it exercised ordinary and reasonable care in the premises," and the concluding one, reading, "thereby causing the accident and injury complained of," the jury received the impression that the court was giving them, not a recital of plaintiff's allegations, but the court's own view of the case.

This was an exceedingly close case on the facts, where it is especially important that the jury be given accurate instructions.

In my opinion the giving of this instruction was error, and because of it, the judgment should not be permitted to stand.

529 - 30793

HERMAN FRIEDL,
Appellee,

v.

OTTO LUHR,
Appellant.

243 I.A. 604

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

In the year 1916, Herman Friedl, the complainant, and Otto Luhr, the defendant, entered into a co-partnership as consulting engineers and architects and continued in that business until about September 24, 1922. On October 5, 1922, a disagreement having arisen, between them, the complainant filed a bill of complaint, in the Superior Court, and asked for a dissolution of the co-partnership, an injunction restraining the defendant from giving out that he had succeeded to the business of the firm, for an accounting, a receiver, and general relief. On January 19, 1923, the defendant filed an answer. On the same day a receiver was appointed

On October 25, 1922, pendente lite, both parties entered into a written agreement providing (1) that the defendant would sign certain papers in regard to certain applications for patents; (2) that when the patents were issued they should be reassigned to the complainant, reserving, however, in the defendant full rights of user; (3) that the complainant should pay the cost of obtaining the patents; (4) that the complainant should not use the name of Luhr & Friedl in advertisements in trade papers; (5) that the busi-

Opinion Filed Oct. 18, 1938.

ness should be called the F. Ice Making System, Multiple Ice Hoisting System, or such name as determined by the complainant, without mentioning the name of the defendant; (6) that the defendant should not advertise the Ice Making System in certain trade papers, Ice & Refrigeration, Refrigerating World, or Refrigeration, for five years; (7) that all inquiries resulting from the present advertising should be the property of the complainant; (8) that the complainant would sign certain papers that a certain Ice Machine could be built by the defendant for the Wisconsin Ice & Coal Co.

On February 26, 1923, the complainant filed a supplemental bill in which it was charged that the defendant had caused to be inserted in the February number (1923) in the publication "Ice & Refrigeration" a full page advertisement, entitled, "Otto Luhr's Modern Method of Raw Water Ice Making," which was in plain violation of the agreement of October 25, 1922. The prayer asked for damages for the injuries caused by the advertisement.

On June 8, 1923, the defendant answered the supplemental bill, and alleged that thecomplainant had violated the agreement of October 25, 1922 by using the defendant's name in an advertisement in the November, 1922 issue of "Refrigeration," and in an advertisement in the December, 1922, issue of "Ice & Refrigeration;" and, as a consequence he, the defendant, considered that part of the agreement restraining him as to advertisement, broken, and considered it his right to off-set the damages caused by the complainant's advertisements, to insert his own.

On July 25, 1923, the complainant filed a replication. The cause was referred to Master in Chancery Humphrey.

On February 26, 1923, without prejudice to the reference, an order was entered giving leave to the complainant to file a second supplemental bill. On the same date the complainant filed a supplemental bill charging that the defendant had refused to comply with the agreement of October 25, 1922; that when certain assignment papers and papers necessary for the prosecution of certain patents were presented to him to be signed pursuant to the just mentioned agreement, he refused to sign them. It prayed that the defendant be ordered to execute the necessary papers, and, in default, that they be executed by an officer of the court.

On April 2, 1924, the defendant filed an answer, admitting that he refused to sign the papers, but alleging that the complainant broke and violated the agreements by certain advertising which was contrary to the terms of the contract, and that such advertising caused him, the defendant, great damage. On April 7, 1924, the complainant filed a replication. On April 10, 1924, the supplemental bill was included in the reference to the Master.

Testimony was taken before the Master and various exhibits introduced, and on September 12, 1924, he filed a report recommending that the defendant be enjoined for a period of five years from advertising in the publications mentioned; that he should be required to assign all necessary papers to be used in the prosecution of the applications of certain patents; and assign certain patents to the complainant. To the report objections and exceptions were made by both parties, and all overruled save one exception made by the complainant. On March 25, 1925, a decree was entered substantially approving the Master's report, and ordering

(1) that the defendant be enjoined until October 25, 1927, from repeating the publication in the trade paper known as "Ice &Refrigeration" of an advertisement appearing in the February, 1923 issue, and from publishing, during the same period, in that paper or in the trade papers, "Refrigerating World," or "Refrigeration," any similar advertisement or any other advertisement contemplated in the prohibition contained in the contract of October 25, 1922, as mentioned in the Master's report; (2) that the defendant forthwith execute and deliver to the complainant all his interest in letters patent, 1465873,1481844 and 1490615, subject to the right of the defendant to use the patents mentioned on any job where he may be engaged by the owner as consulting engineer to design and supervise the installation and erection of a plant for the manufacture of artificial ice; (3) that should the defendant fail and refuse to execute and deliver, as required by the decree, that then the assignments should be executed by the Master; (4) that the complainant recover from the defendant the court costs taxed and to be taxed (5) and that jurisdiction be retained for the purpose of an accounting between the parties, and a settlement of the accounts of the Receiver. This appeal is from that decree.

The substantial questions in the case are whether the Chancellor was justified (1) in enjoining the defendant in the matter of advertising, and (2) in ordering the defendant to execute and deliver certain papers. The answers to those questions depend primarily upon a construction of the terms of the contract of October 25, 1922, made pendente lite, and upon the evidence showing the conduct of the parties subsequent to that date.

The firm of Luhr and Friedl consisted of the complainant and the defendant. They had known each other for many years. The complainant was an architect, and the defendant a consulting engineer. In 1916 they formed a copartnership, and on January 12, 1917, entered into a written agreement whereby they became partners, under the firm name of Luhr and Friedl, for a period of five years, as consulting engineers and architects. In September 1922, trouble arose between them, and notices were sent out from the office of the defendant announcing that the firm had been dissolved and that its business would be continued under the name of Otto Luhr, Consulting Engineer, at 118 N. La Salle St. On October 5, 1922, the bill of complaint herein was filed asking, among other things, for a dissolution. The business of the firm consisted chiefly in the designing and construction of artificial ice plants. Prior to the time of the sending out of the notices from the defendant's office, an order had been received from a company in Milwaukee for plans for an ice plant, and work had been done thereon. On October 25, 1922, while this suit for a dissolution was pending, the complainant entered into two written agreements, one concerning the contract with the firm in Milwaukee, and the other chiefly concerning their interests in certain patent rights and their rights to advertise.

The latter contract contained the following:

> "Herman Friedl further agrees not to use the name of Luhr & Friedl in any advertisement in trade papers, and the system is to be called the F. Ice-Making System, Multiple Ice Hoisting System, or some such name as determined by Herman Friedl, but the name of Otto Luhr is not to be mentioned in any advertisement.

Otto Luhr further agrees not to advertise the Ice Making System referred to above in either of the following publications; Ice & Refrigeration, Refrigerating World or Refrigeration, for the term of five years. All inquiries resulting from the present advertising are to be the property of Herman Friedl."

It is claimed for the defendant that the complainant, shortly after October 25, 1922, caused to be published in the December issue of "Ice and Refrigeration" and in the November and December issues of "Refrigeration" certain advertisements, wherein the name of the defendant and certain text was used which was in violation of their agreement; and that as a result the defendant was relieved from liability. The evidence shows that the defendant caused to be published in the February 1923 issue of "Ice and Refrigeration" an advertisement which, considering its text, was, obviously, as the Master found, in plain violation of the contract of October 25, 1922. It is claimed, however, for the defendant, that it was published "to offset, in part, the injury and damage caused by" complainant's breach. We think the whole matter of advertising is here negligible. Each apparently did or permitted something in the way of advertising that ought not to have taken place. The advertisements are too elaborate to be set forth here; but it is plain that they are, in and of themselves, insubstantial, and that what the complainant did in that direction, is no sufficient reason for the refusal of the defendant to carry out the substantial obligations of the contract of October 25, and certainly no justification for the advertisement published by the defendant. The defendant did not ask that the complainant be restrained in any way. Thereis little, if any, doubt from the evidence and the testimony of both parties, that no further

conduct will be indulged in that will be in any way in violation of the contracts on the subject of advertising. Further, the defendant, even if it were to be assumed that the complainant overstepped his rights as to advertising, has not shown in any way that it damaged him. In our judgment, therefore, the Chancellor did not err in enjoining the defendant in regard to future advertising, as provided in the contract.

In the brief of counsel the following language is used, "It (the defendant's answer) admitted the co-partnership, the inability of the partners to get along with one another any longer, the request for a receiver, etc. In fact, there is no assignment of error on any part of the decree with reference to the original bill and answer." The result is, the Chancellor was called upon, on a matter that had arisen pendente lite, to pass upon the conduct of the partners as far as it pertained to rights and obligations arising under the contract of October 25. He saw fit in his judgment to enjoin the defendant until October 25, 1927 from repeating certain advertisements in certain papers, and from publishing any advertisements in violation of the contract. We think he was justified in so doing.

The Chancellor, also, ordered the defendant to execute and deliver forthwith certain papers in regard to three patents, and provided that they should contain a reservation to the defendant of certain rights of user. In his testimony, the defendant stated that he was willing to assign the patents subject to the provisions of the contract. Apparently, his

only desire is that the papers pertaining thereto shall be in proper form. It follows, we think, from the evidence, that the Chancellor did not err in ordering the execution and delivery of the patent papers. Some claim is made for the defendant, however, that it was erroneous to order an assignment of patent, No. 1480615, as it was not issued until after the supplemental bill praying for an assignment of patent rights was filed. But the contract of October 25 covered applications, and patents to be issued; and as the court under a bill for a dissolution and an accounting has charge of all partnership assets, it was not necessary that any change in the quality of the assets, that is, from applications to patents, should be further pleaded. This is, as has been said, a proceeding primarily for a dissolution of a co-partnership and for an accounting, and, in consequence, all res are subject to the jurisdiction of the court.

In the statement of the case in defendant's brief, the subject of payment of expenses and attorney's fees is mentioned, but as it is not mentioned among the points made and is not argued, we refrain from discussing it.

For the foregoing reasons, the decree is affirmed.

AFFIRMED.

O'CONNOR, J. and THOMSON, J. CONCUR.

71 - 30887

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

JOSEPH PIATEK,
Appellant.

243 I.A. 604

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a criminal proceeding begun by filing an information, charging Joseph Piatek, the defendant, with an assault upon one John Nash. There was a trial before the court, without a jury. The defendant was found guilty, and sentenced to 30 days in the house of correction and to pay a fine of $25.00 and costs.

The matter comes before us upon a writ of error sued out by the defendant. The information charged that the defendant, on June 8, 1925, with a certain instrument commonly called a compressed air hose, said compressed air hose being a dangerous and deadly weapon, without any considerable provocation whatever and under circumstances showing an abandoned and malignant heart, wilfully and maliciously made an assault upon one John Nash, with intent then and there to inflict upon the person of said John Nash a bodily injury contrary to the statute in such case made and provided and against the peace and dignity of the people of the State of Illinois.

The defendant entered a plea of not guilty, and

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Opinion filed Oct. 13, 1888.

waived a jury trial.

The statement of facts, certified to by the trial judge, as correct, is as follows:- The defendant is nineteen years of age. He and John Nash, aged eighteen, and One John Coughlin, aged twenty, were on June 8, 1935, and had been for some time prior thereto, employed nights by R. R. Donnelly & Co., printers, as roll tenders and were and had been working on the first floor of the printing plant of that company at 21st street and Calumet avenue, Chicago. Part of their duties was to clean the printing presses and floor underneath with compressed air. This compressed air was applied to the various parts of the presses and the floor through a nozzle attached to a hose, which hose was about fifty feet long and was attached to the compressed air machine. This machine was on a wheeled cart which was rolled around from place to place as needed, and the hose was coiled on this cart and uncoiled as additional length of hose was required. The compressed air was turned on and off by means of a switch or apparatus attached to the cart, and was of 225 pounds pressure.

On June 8, 1935, the defendant and said John Coughlin started to work about 7:00 o'clock in the evening cleaning the presses and floor. Coughlin operated the nozzle and applied the compressed air where needed; the defendant turned the compressed air on and off as and when directed by Coughlin so to do. They had been working about an hour and a half. Nash was working on the press adjoining the one which Coughlin and the defendant were cleaning. At about 8:30 P.M. Coughlin was standing in front of the press with the nozzle of the hose in his hands, apparently about

noises a last entry.

The statement of facts, published to be the basis
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[illegible] Dr. Dunglison, aged twenty, born on June 8, 1928, and
[illegible] been for some time [illegible] employed nights by
R. Donnelly & Co., printers, [illegible] and
[illegible] Dr. Dunglison was [illegible] the printing
[illegible] that machine at that moment and [illegible]
[illegible]. Just at [illegible] began to clean the printing
[illegible] and [illegible] with compressed air. This
compressed air was applied to the rotating parts of the
machine and [illegible] the [illegible] was [illegible] to a [illegible]
[illegible] was [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible]

to clean the floor under the press. He directed the defendant to turn on the air. The defendant turned on the air and stepped back about seven or eight feet and sat down on a window sill. Coughlin instead of applying the Compressed air to the floor under the press, grabbed Hash and applied the nozzle of the hose to his, Hash's trousers at his rectum. The compressed air was forced into his rectum and his intestines were injured, being perforated in about nine places, and he was taken to the hospital. Hash was friendly to and with both Coughlin and the defendant.

The defendant testified that he stood by the stop cock of the hose and while Coughlin was applying the nozzle to Hash's rectum made no attempt to shut off the air, but he had no intent to do Hash injury.

The question arises whether the evidence sufficiently shows that the defendant, with the compressed air hose, as a dangerous and deadly weapon, and with an abandoned and malignant heart, wilfully and maliciously made an assault on John Hash, with intent to inflict bodily injury, contrary to the statute. How far the defendant was from Coughlin when the latter directed him to turn on the air is not shown, although the evidence shows that the hose was, altogether, about fifty feet long. When the defendant turned on the air at the request of Coughlin, he stepped back about seven or eight feet and sat down on a window sill. There is no evidence from which it may be inferred that after Coughlin grabbed Hash and applied the hose to him, the defendant could have shut off the air in time to save Hash from being injured. There is no evidence that the defendant took any part in the assault; and there is no evidence even that he

intended in any way that there should be an assault, unless it may be claimed that because he testified that he stood by the stop cock of the hose while Coughlin was assaulting Nash and made no attempt to shut off the air, he must be considered, by his omission to act, as having sanctioned the acts of Coughlin. But, such a deduction, even if plausible, would be insufficient in law to justify the conclusion that he was guilty, beyond a reasonable doubt, of the crime charged. The evidence is too meagre; it does not show how far away he was; it does not show that he had even any premonition of what Coughlin was going to do; it does not show any intent to inflict bodily injury on Nash. As far as the evidence shows, it was solely the act of Coughlin that injured Nash. That the defendant failed to act overtly in a preventive way, by turning or endeavoring to turn off the air, when he saw what Coughlin was about to do, or was doing, is, in and of itself, without more, insufficient to make out the cause of action stated in the information; it shows neither intent, nor affirmative participation with knowledge. The principle of law applicable to the evidence in the instant case is stated in White v. The People, 139 Ill. 143:

> "The mere presence of a party at an assault with intent to kill is not sufficient to constitute him a principal, unless there is something in his conduct showing a design to encourage, incite or in some manner, aid, or abet or assist the assault. Aiding, abetting or assisting are affirmative in their character. It is not sufficient that there is a mere negative acquiescence, not in any way made known to the principal malefactor."

Crosby v. The People, 189 Ill. 298; People v. Cione, 293 Ill. 321.

Hunter v. The Queen, 139 D.L.R. (3d) 289, [1983] 1 S.C.R. 124.

[illegible]

There is no evidence that, by any affirmative act he assisted or took part in the assault. It does not show that he turned on the air so that it might be used against or to injure any one. All it shows, at the most, is that he did not overtly undertake to prevent the assault from being made. Coughlin alone had the instrument, alone used it, and alone produced the injury. The evidence is that "about 8:30 p.m. Coughlin was standing in front of the press with the nozzle of the hose in his hands, apparently about to clean the floor under the press," and directed the defendant to turn on the air. It does not show that Coughlin was about to assault Nash. If it did, the case would be very different. There then might be justification for the judgment. Further, the evidence of the defendant is that he had no intention to injure Nash, and that evidence is not in any way controverted. Wohlford v. The People, 148 Ill. 296.

It is contended for The People that the bill of exceptions does not fulfill the requirements of Section 83 of the Municipal Court Act, and the case of City of Chicago v. Isaacson, 195 Ill. App. 376 is cited. The bill of exceptions purports to be a transcript of a summary of the evidence, compiled by counsel, and certified to by the court. That, together with the stipulation to incorporate the original bill of exceptions or statement of facts and law in the transcript of record in lieu of a copy, we think is sufficient.

Taking the record, as it is, we are of the opinion that it entirely fails to prove the charge made.

For the reasons stated the judgment will be reversed.

O'CONNOR, J. AND THOMSON, J. CONCUR. REVERSED.

86-30903

243 I.A. 604

THOMAS CUSACK COMPANY, a Corporation,

APPELLEE;

vs.

AUSTIN CONSTRUCTION COMPANY, a Corporation,

APPELLANT.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an action of trespass on the case, wherein it is charged that an automobile driven by an employe of the plaintiff, Thomas Cusack Company, was run into by a truck belonging to the defendant, Austin Construction Company, and seriously damaged. There was a trial before the court, without a jury, and a finding and judgment for the plaintiff in the sum of $400.00. This appeal is therefrom.

The only witness who testified for the plaintiff, was George Haskett, one of its employes. His evidence is to the following effect; - On August 24, 1923, about 7:15 A .M. he was driving a Dodge Roadster east on Lake Street, an east and west street, towards La Vergne Avenue, which runs north and south and crosses Lake Street. He was following a truck which belonged to the defendant, being about 20 to 25 feet behind it, and was driving in the east bound car tracks of Lake Street. He was driving at the rate of 15 to 20 miles an hour, and the truck ahead of him was going at about the

Opinion filed Oct. 13, 1938.

same speed, perhaps a little slower. On Lake street there is an elevated railroad which is supported by posts which are two feet square. The posts stand on each side of Lake Street, about 15 feet from the curb; about three feet outside of the car tracks on each side of the street; and are east and west, 40 feet apart. Approaching La Vergne Avenue, and when 20 to 30 feet behind the truck, and 50 feet from the crossing, he sounded his horn as a warning, after which he turned over to the left, or the west bound street car tracks, in order to pass the truck, and as he did so the truck swerved sharply to the left, and caught the car he was driving, in between the elevated post and the truck, and crushed it. Before the collision he was watching the truck. He could not see the driver. There was no arm extended for warning, or any signal given that the truck was about to turn. The truck was turned, to the west of the center point of La Vergne avenue. He, the witness, although he already had gotten over into the west bound car tracks, drove over further to the left to avoid the truck. In doing so, he had to go in between the elevated post and the truck, and the truck, turning at the time, caught the Dodge in between it and the post, and crushed it. The collision smashed the winter top, the rear fender, and some mechanical parts. On cross-examination he testified that he had been following the truck about a block; that Lake street is 40 feet wide; that there were no cars parked to the right; that his brakes were in good condition; that under the conditions that existed, going 20 to 25 miles an hour, he could stop his car in 15 to 20 feet; that immediately after he, the witness, sounded his horn, he started to pull on to the left track, and at that time, the truck was about five feet from the corner; that the

elevated post is on a line with the curb on La Vergne Avenue; that he started to accelerate his speed after he had sounded the horn; that when the truck started to turn to the left, he, the witness, was about ten or fifteen feet behind it; that as the truck kept on making a short turn, he, the witness, kept on going to the left.

For the defendant, two witnesses, the driver of the truck, Swanson, and his helper, Gilstrom, testified. The evidence of Swanson is as follows: At the time in question, he was driving an empty Nelson La Moon 2½ ton truck, which belonged to the defendant. The truck was 15 feet long, had a steel body, with a steel box about a foot high; the wheels, equipped with solid tires. It had a left hand drive, and he sat on the left, with his helper at his right. He was driving east on Lake street, on the east bound car tracks, at about 15 miles an hour. Lake street is paved with brick, and the truck made a great deal of noise. There was no other traffic on the street. When he got to the corner of La Vergne Avenue, after he had crossed the elevated post, he started to turn. He did not see the plaintiff's car before the accident, nor did he hear a horn blown. He did not make a short turn. He started to turn when he got up to the post at the southeast corner. When he felt the impact, he got off the truck and found the front of plaintiff's car was practically all over the back end of the truck; the foot step had hit the elevated post and the other side of it hit the front of the truck; he could hardly separate them. The rear wheel of the truck was about seven feet southeast from the post. No part of the truck was in line with the post. That he began to turn his truck when on a line with

the post at the northwest corner; that he did so because, if a quick turn is not made, you go over on the sidewalk, on the east side of the street, owing to the length of the truck. Just as he was going to turn, he looked back on his left and did not see anyone.

The evidence of Gilstrom, the helper, is as follows: - He was sitting on the right side of the truck. When the driver started to turn the truck, it was 10 or 15 feet west of the post at the southwest corner of La Vergne Avenue and Lake street. There was no other traffic on the street; He did not hear a horn blown. The truck made a lot of noise. The first he knew of the other car was when the crash came. The truck, then, had already turned into La Vergne Avenue. The other car collided with the truck - on the left side of the truck. The truck had to be backed out to let the other car get away from the post.

From the record in this case it further appears that Section 3836 of the Chicago Municipal Code of 1922, provides that "all vehicles shall keep as close to the right hand curb as safety and prudence shall permit, except when overtaking and passing another vehicle * * *. An overtaken vehicle must at all times be passed on its left side, except in case of motor vehicles and motor cycles passing street cars or other vehicles when running within the car tracks; in such case such motor vehicles or motor cycles shall not turn to the left into the track reserved for street cars and vehicles moving in the opposite direction, but shall pass to the right of such street car or vehicle so overtaken." Therefore, when Haskett, in an

effort to pass the defendant's truck, turned over into the west bound car track, he violated the provisions of this ordinance, under which it was his duty to turn to the right between the street car track and the curb if he wished to pass the truck. Swanson had the right to assume that no one was going to come up behind him and endeavor to pass him on the west bound car track. In doing so it must be held that Haskell was guilty of such contributory negligence as to defeat any recovery on the part of the plaintiff. The issues having been submitted to the trial court without a jury, the judgment of that court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

O'CONNOR, J. AND THOMSON, J. CONCUR.

FINDING OF FACT: We find as a fact that the driver of plaintiff's car was guilty of contributory negligence.

108-30926

243 I.A. 604

JOSEPH WIERZBOWSKI, APPELLEE, vs. GEORGE SELNIAK, APPELLANT.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

Opinion filed Oct. 13, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On March 31, 1924, Joseph Wierzbowski, plaintiff, a real estate agent, brought suit in the Municipal Court against George Selniak, the defendant, for a commission for bringing about an exchange of certain real estate belonging to the defendant. There was a trial before the court, with a jury, and a verdict and judgment for the plaintiff in the sum of $350.00. This appeal is therefrom.

The testimony of the plaintiff is substantially as follows: - He is and has been a licensed real estate dealer since 1917. He first met Selniak, the defendant, about October 27, 1923. He saw him on November 17, 1923, about six P. M., at his home, after he came home from work. The defendant told him he wanted to exchange his property, said he would sell it for $13,000.00 cash, or exchange; that if he could get a buyer, or make an exchange, he, the defendant, would pay him a commission. On November 17, 1923, the defendant told him that, if he had anything to show, as

he, the defendant, worked every day, he should show it to his wife, Mrs. Belniak. On November 20, he, the plaintiff, called and told Mrs. Belniak, he had two pieces of property in the neighborhood, and took her in his car and showed her some property on Newport Avenue and on Roscoe Street, and she said the one was too big and the other she did not care for. He next saw Mrs. Belniak at her home on December 15. He told her he had some property at Oakley and Lyndale, and took her and her daughter and showed them 1339 S. Oakley Avenue, at the corner of Lyndale, took them all through the building, and they started to talk business. The defendant asked Mocarwski, who had the other property for exchange, if he had seen his, the defendant's property, and Mocarwski said, yes, that he had seen it the day before and liked it. Each then told the other his price. Mocarwski said he wanted about $16,000.00, and the defendant said he might want $15,000.00. He, the witness, said he had Mocarwski's at $14,800.00 cash, and the plaintiff's at $12,500.00 cash. They nearly came to terms at that time, but the defendant said he would have to think it over. They asked him, the plaintiff, how about commissions, and he told them they had agreed to pay him 3%, $375.00, and the defendant said, that was all right, but they would have to get Mocarwski to cut his price down. Later, on December 30, 1933, he called on the defendant and told him he thought he was going to make a deal, but the defendant said, "I like the property, but it is a little small." "I think we will do business, after Christmas I will let you know." About the middle or latter part of January 1934, he asked the defendant how about the deal, and he said he was not feeling very well and he had

better wait till it was warmer. "You don't need to watch us, we can't make a deal without you, when I am ready I will let you know." In the first part of February he called, but found no one at home. He called again on February 23, and saw both the defendant and his wife; and the defendant said, "I am not ready yet, when I am ready I will let you know." He called twice in March, but no one was at home. Sometime in May he called again and found Mocarwski's name there in place of the defendant's. He, the witness, rang the bell and Mrs. Mocarwski came to the door. He then went to 2329 Oakley Avenue, the property formerly owned by Mocarwski, and found Mrs. Selniak in the store, and asked her why they did not let him know, as they had promised, when they were ready to make the deal. At that time the defendant was not present. Several days later he met the defendant there and told him that he, the witness, showed his, the defendant's property, and gave the address to his wife and tried to make a deal, and he said he would call him up when he got ready, and, then, asked him, the defendant, how, about the commission; that the defendant said they knew the property before, and got the matter through, without him; that Mocarwski did not want to pay a commission, and why should he? The witness then told him that he wanted his commission; that he, the defendant, agreed to make the deal and then delayed, why not settle? He saw the defendant again in June at 2329 W. Oakley Avenue and served him with a subpoena in a suit he brought against Mocarwski for commission on the same deal.

He went into the kitchen and told Mrs. Belniak he wished to see her husband, that he had a subpoena for him; that she said, if you want your commission I will give it to you, and then slapped him three or four times in the face, and showed him the door. He further testified that at the meeting in December, 1923, after he told them the commission would be 3%, which would be $375.00, the defendant said, all right, and agreed to it; that Mocarwski said, "I know Belniak for so many years, I will pay you a good commission;" that the defendant agreed to pay him, the plaintiff, 3%, and said, "Don't worry, any time we make a deal without you, you are entitled to it, you showed me the property." The 3% was to be on the sale or exchange of the property, and the agreed exchange price of the defendant's property was $13,000.00, and that of Mocarwski $14,500.00. On cross-examination he testified the defendant asked him, "How much do you charge, commission?" and he answered, "The regular commission is 3½%, but I am going to make it 3%;" that the defendant then said, "All right, I will pay that."

In November, he said to Mocarwski, "If you make an exchange, you pay your commission and the other party will pay his commission." When, in December, he talked with the defendant at Mocarwski's, they had not talked together before that time; that he introduced them to each other; and showed Mocarwski, the defendant's property, and the next time showed the defendant Mocarwski's property.

The evidence of Stanley Skora, called by the plaintiff, is substantially as follows: - One afternoon, about 5 o'clock, in the latter part of June, 1924, he went with the plaintiff to 3229 Oakley Avenue. A girl met them,

and the plaintiff asked to see her father. She saw her mother and father were in the kitchen, and invited them in. Mr. and Mrs. Belniak then came in, and the plaintiff said to the defendant, tendering him a subpoena, "Mr. Belniak, you know you don't want to pay a commission and I have filed suit and you have to come to the case with Mocarwski;" that then Mrs. Belniak jumped right at him, the plaintiff, and slapped him in the face. The defendant said, "I know you deserve your commission, you know I am not against it, I am willing to pay you, but the other man didn't want to pay commission, why should I pay?" The plaintiff said, "I was working for both of you and why should you not pay?" After the plaintiff left, he, the witness talked with the defendant, and the defendant said that they had some kind of a deal to exchange a property, and Mocarwski did not want to pay a commission, and persuaded him that he should not pay one; that the defendant said, "I will pay it, but I don't like to see trouble," and Mocarwski said, "I should not do that and I am not going to do it myself too."

For the defendant, besides his own testimony, there was introduced that of his wife, and their 12 year old daughter; that of Mocarwski, the other party to the exchange, and his wife, and one Lysogorski, a brother-in-law of the defendant. Their evidence, in general, amounts to a categorical denial of all the material facts. It is admitted, however, by the defendant that in the fall of 1933 he discussed the sale of his house with the plaintiff, and that the plaintiff asked him if he would exchange his property, and that the plaintiff, on one occasion, took him

over to see a piece of property on Leavitt Street, which, after seeing, he told the plaintiff he did not want, and that on another occasion, the plaintiff took him to see some property on Armitage Avenue, which after seeing, he, the defendant, told him he did not want. The defendant testified that the plaintiff called a third time, and he told him not to bother him, "if you sell the house for cash, you will get your commission;" that he told him he wanted $18,500.00 cash. He denied that the plaintiff introduced him to Mocarski, and claimed that his brother-in-law, one Lysogorski, introduced him in 1924. On cross-examination, he testified that the first time he met the plaintiff, the latter asked him if he would sell for cash, and he said, yes, and then when the plaintiff asked if he could make an exchange, he, the defendant, said he would have to see the other building.

It would be a work of supererogation to set forth the categorical denials of the defendant and his witnesses; they constitute, if believed, almost a complete negation of all that tends to make out the plaintiff's case. Rarely does a record disclose such complete contradiction. In such a case, of course, on review, the only question then is one of credibility. It is impossible, scientifically, to state all the elements necessary to induce credence. In making out a cause of action, the law provides a jury as the chief determining body. The jury passes judgment, and, in so doing, is entitled to consider many things that are not, and cannot be presented to enlighten us. Maggari v. Peoria Ry. Co. 179 Ill. App. 223. It follows that their verdict, confirmed by the trial judge, as here, comes to us with considerable

weight, and is not to be overridden, unless upon an examination of the record, it is disclosed that it is clearly against the weight of the evidence. Garney v. Cheney, 295 Ill. 78. Cinopoli v. Chicago Rys. Co., 233 Ill. App. 432. Here the story of the plaintiff, full of details, is plausible, and it is supported by the seemingly strong testimony of Khora, apparently a disinterested witness. They may or may not have told the truth, but that, in and of itself, is beside the issue. The law deals in probabilities and cannot always require scientific demonstration. If here the witnesses were all of equal credibility, the plaintiff would fail. But the jury has by its verdict, so we are bound to interpret it, said that they are not. If they are not, and the plaintiff and Khora are to be believed, then unless in their testimony improtant discrepancies are disclosed by the record before us, we are bound by the law to confirm the verdict. We find no such discrepancies. After a careful analysis of all the evidence, it is our judgment that it would be unreasonable to hold that the verdict is so clearly against the weight of the evidence that it should be overridden by us.

It is contended that the exchange having been made on a valuation of $12,500.00, for the defendant's property, the plaintiff, at a rate of 3% for commission, was, in any event, entitled to $375.00, whereas the verdict was for $350.00. The difference is so slight that it cannot be said to suggest or show any misconduct or serious misconception or prejudice on the part of the jury; and being for less damages than were claimed, it would not be reasonable to consider it as an error of such substance to justify a reversal.

Though no point of it is made in the brief for the defendant, it is argued that certain memoranda which the plaintiff testified to on rebuttal, were erroneously admitted in evidence. The argument is refuted, however, by what was stated by the trial judge at the time the memoranda were offered. He said, "By agreement of counsel this page in the book is considered as offered in evidence as bearing on the credibility of Mocarwski, but is not to be considered as binding on the defendant." Further, it was entirely proper, as it tended to show the exact time when Mocarwski listed his property with the plaintiff, which varied somewhat from the testimony of Mocarwski himself.

For the reasons stated above, the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

10 - 30360

RACHEL IZEN,

Plaintiff in Error,

v.

ABE PLOINSKI, MAURICE GORDON AND LIPTON LAVIN,

Defendants in Error.

243 I.A. 604

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the three defendants to recover damages for personal injuries sustained by her. At the close of the plaintiff's case there were directed verdicts in favor of each defendant and plaintiff appeals.

The record discloses that plaintiff was injured at the intersection of Homan avenue and Roosevelt Road, Chicago; Homan avenue runs north and south and Roosevelt Road east and west. Plaintiff was riding in the back seat of a Ford automobile, which was being driven by the defendant, Ploinski, north in Homan avenue across Roosevelt Road, when Ploinski's automobile was struck by two automobiles, one being driven west in Roosevelt Road by the defendant, Gordon and the other east in the same street by the defendant Lavin. The three automobiles collided somewhere in the intersection and plaintiff was thrown out and injured. Plaintiff testified in her own behalf that about the middle of the forenoon of Sunday, November 5, 1922, she went to

Opinion filed Oct. 15, 1938.

Ploinski's home for the purpose of showing Ploinski's mother a house which was for sale; that Ploinski, his mother and other members of the family, including plaintiff, were driven by Ploinski in his Ford automobile to the house which plaintiff desired to sell and after the parties had examined the house, Ploinski drove back to his home where all of the persons got out of the machine and plaintiff started to go home, when she was called by Ploinski, who stated that he was going to drive his car and that he would take plaintiff home, thereupon plaintiff got into the Ford automobile and sat in the back seat. Ploinski was in the front seat driving north in Homan avenue and as he reached Roosevelt Road, plaintiff saw the cars coming from the east and from the west; that when she saw the two approaching cars, they were each about a block away, and she spoke to Ploinski and told him "Look out now"; that all three of the automobiles were being driven "fast"; that somewhere in the street intersection the three machines bumped together and she was injured and that the three came together at about the same time.

Each of the defendants filed a plea of the general issue . Gordon and Lavin each also filed a special plea of non-ownership and operation of the automobiles, and the defendant Ploinski filed a special plea alleging that he and plaintiff were engaged in a joint enterprise. When the case went to trial, the record discloses that the special plea filed by the defendant, Gordon, was withdrawn by agreement but his counsel in this court contends that the action of the trial court in directing a verdict for the defendant

Gordon was proper and the judgment entered thereon, should be affirmed because, as his counsel states, "There can be no statement of the case made as to the defendant, Gordon, for his name is nowhere mentioned in the record, nor does his interest in this lawsuit anywhere appear." And further it is contended that this defendant filed a special plea denying ownership and operation of the automobile as charged in the declaration, and since there is no evidence showing that Gordon owned any of the automobiles involved in the collision, or had anything to do with the accident in question, the judgment should be affirmed. This is a somewhat surprising argument to make, in view of the fact that the special plea was withdrawn and therefore, the ownership and operation by Gordon of one of the automobiles was not in issue. This law has been so long and so firmly established as not to require the citation of any authority.

We think the court was in error in directing the verdicts. The evidence shows that plaintiff was in the exercise of due care and caution for her own safety and there is no contention to the contrary. That she was injured is not disputed, as a result of the three automobiles bumping together at the street intersection. It was a bright day in November and certainly the evidence made a prima facie case to the effect that some one or all of the defendants were negligent, and that as a result of such negligence, plaintiff was injured. Plaintiff testified that she saw both automobiles, the one coming from the east and the other from the west, when they were each about a block away from the street intersection where the collision occurred and

that all three cars were being driven fast, and she called them to the attention of Plcinski, who was driving the Ford in which she was riding. In these circumstances we are of the opinion that the question of the negligence of the defendant should have been submitted to the jury.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

283 - 30484

CHARLES F. MORGAN,

Appellee,

v.

NEW YORK CENTRAL RAILWAY,

Appellant.

243 I.A. 605

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover damages for injuries sustained by him by reason of being struck by one of defendants' trains in South Bend, Ind. There was a verdict and judgment in favor of plaintiff for $5,000.00 and the defendant appeals.

As the case went to the jury, the only charge remaining in the declaration was that the defendant had been injured through the wilfull and wanton negligence of the defendant. The facts in short compass are that the defendant operates a railroad in South Bend, Ind. The railroad tracks through that city, at the place where plaintiff was injured, run in an easterly and westerly direction a little north of east so that the streets do not cross the railroad tracks at right angle. Immediately north of the defendant's track are a number of tracks of the Grand Trunk Railroad. Plaintiff was about 47 years of age, and at the time he was injured, January 30, 1923, he was employed by the Oliver Steel Plow Works, located near defendant's tracks in South Bend. On the day in question he went to defendant's yard office located

Circuit Court, Cook County, Illinois.

near defendant's tracks some five or six blocks west of the plow works and after transacting business with defendant he started back to the place of his employment, walking along a path on defendant's right of way immediately south of defendant's railroad track. The evidence shows that the public used this path for about twenty-five years without objection by the defendant and that from six hundred to one thousand people passed along the path daily; that on the south side of the path there was a board fence about four to six feet high and extending along the path for about 115 feet; that as plaintiff continued his walk toward his place of employment one of defendant's passenger trains coming behind him struck and injured him as he was passing between the train and the fence. And it is for the injuries thus sustained that he sues. The evidence further shows that the engineer of the train brought it to a stop something more than a 100 feet after striking plaintiff; that plaintiff was put in the baggage car and taken a short distance on the train and then removed where he received medical attention.

Defendant's tracks at the place in question do not extend in a straight line, but on a slight curve. The accident occurred between Harris and Walnut streets, which is an ordinary city block and near the westerly end of the fence. A ten foot alley runs east and west so that the west end of the alley is adjacent to defendant's right of way, while the east end is several feet from the right of way. This is occasioned by the fact that the railroad does not run due east and west. Some time after the accident defendant's employes ran an engine of the same dimensions

as that of the engine that struck plaintiff and took measurements between the engine and the board fence. These measurements showed that the distance between the board fence and the overhang of the engine at the westerly end of the fence is 30-3/8 inches and at the east end 34 inches. The fence is not on a straight line, but the distance between the overhang of the engine and the fence varies from 37 to 43 inches.

The engineer of the train in question testified that he had been employed as a locomotive engineer for forty-one years; that he had known the plaintiff for thirty years; that on the morning in question he left Streeter, Ill. for South Bend, Ind.; that the train consisted of a locomotive, baggage car and two coaches; that the last stop before plaintiff was injured was about 300 yards from that place; that after starting up he blew his whistle for the railroad crossover, about Ford street and again at Harris street, which the evidence tends to show is about 200 feet from the place plaintiff was struck; that he blew his whistle at Harris street because he saw plaintiff walking along near the track; that plaintiff was carrying a cane; that the bell on the engine was ringing; that at no time did the plaintiff walk on the track; that he saw plaintiff all the time and after plaintiff had passed the westerly end of the fence, five or six steps, the accident occurred; that he sounded a warning whistle; that the front part of the engine passed plaintiff and then plaintiff slipped and fell backwards against the cylinder and steam chest of the engine and was thrown to the ground; that after this he applied the brakes and stopped in

about 100 feet and that he had seen men go down the alley which commences near the end of the fence. He further testified that the ground was icy.

Some witnesses of defendant testified that they had seen persons walk in the path between the fence and the railroad track when trains were passing. Others testified that they had never seen persons walking in the path when trains were passing. Some of the witnesses who testified that they were in the path when the trains were passing were those who were making experiments after the accident, some of whom were brakemen or railway employes who were standing in the path while the train on which they worked was passing; others testified that a man by hugging the fence would not be struck by a passing train. The pathway was somewhat uneven and sloped down toward the center of the path. A number of witnesses testified as to how far beyond the westerly end of the fence plaintiff was when struck by the engine and as is usual in such cases the testimony of the witnesses vary. All of them place him toward the westerly end. Some state that he had passed beyond the westerly end about five or six feet and others farther down. The engineer testified that he was five or six steps and the testimony of other witnesses is to the effect that he was still farther along in the path between the fence and the track. A number of photographs, showing the fence and the alley are in the record, one of which shows the westerly end of the fence and the alley from which it appears that the westerly end of the fence which the measurements show was 30-3/8 inches from the overhang of the engine, continues at an angle to the right for some distance before it

reaches the alley.

The defendant contends that plaintiff's injuries were the result of an accident; that there was no evidence tending to show that the defendant was guilty of wilfull or wanton conduct, and, therefore, there should have been a directed verdict for the defendant as it requested. What constituted wilfull and wanton negligence has been the subject of consideration in a number of recent decisions by our Supreme Court, and they all hold that ill-will is not a nessessary element, but that to constitute a wanton act, the party doing the act must be conscious of his conduct and from his knowledge of surrounding circumstances and the existing conditions, that his conduct will naturally or probably result in injury. Bernier v. Illinois Central R. T. Co., 296 Ill.464; Bremer v. L. E. & W. R. R. Co., 318 Ill. 11; Waldren Express Co. v. Krug, 291 Ill. 473; Jenesary v. C. & I. Traction Co. 306 Ill. 393.

In the Bernier case the court in discussing the question of wanton or willful negligence said (p.470) "The question whether a personal injury has been inflicted by willful or wanton conduct is a question of fact to be determined by the jury. Illinois Central Railroad Co. v. Leiner, 202 Ill. 624.

"Ill-will is not a necessary element of a wanton act. To constitute a wanton act theparty doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that

his conduct will naturally or probably result in injury. (30 R.C.L. 21) It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent, to a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case."

In the instant case we think it clear from all the evidence that it was a most dangerous place for a person to walk along the right of way between the fence andthe railway track. And whether the engineer, who saw plaintiff when he was several hundred feet from him walking along the path with his back toward the train and who gave no indication that he had heard the ringing of the bell or the blowing of the whistle, and considering that the path was icy; that there were other trains on the Grand Trunk Railroad in the immediate vicinity and the narrow space between the fence and the passing train, was guilty of wanton conduct was a question of fact for the jury. Bernier v. Illinois Central R. R. Co., supra. In this connection counsel for defendant argues that plaintiff was not in a position of danger until he passed between the end of the fence and the railroad track and that after passing between the fence and the track the time was too short to prevent plaintiff's injury and that the engineer might justly presume that plaintiff would walk up the 10 ft. alley. An examination of the photograph above referred to, discloses the fact that if plaintiff intended to turn into the alley he would necessarily have done so a number of feet before he reached the end of the fence. The court instructed the jury,

at the request of the defendant, that the engineer was justified in assuming "up to the last minute" that if a person is upon or near a railroad track and apparently in possession of his senses, he would get out of the way, and that there is no rule of law which could charge defendant's employees with knowledge "that while Mr. Morgan was in a position of safety he would change his position of safety for one of peril." Under this instruction the defendant certainly could not ask for more on the question. They were also told to take into consideration all the evidence in the record. The testimony of the engineer was to the effect that after plaintiff was picked up and put into the baggage car, he stated in reply to the engineer, that he had heard the whistle but thought it was from an engine on the Grand Trunk. There is considerable evidence in the record as to whether plaintiff slipped and struck the engine or whether he was struck without slipping. We think the question whether plaintiff slipped or fell is immaterial, because we are of the opinion that the path between the fence and the train was an exceedingly dangerous place for a person to be when the train was passing.

A further point is made by the defendant that even if it were guilty of willful and wanton conduct, under the evidence, "then by the same token the plaintiff was guilty of like conduct and cannot recover." In support of this it is argued that under the law in such case where the parties are in pari delicto no recovery can be had. In plaintiff's original brief no authorities were cited to support this proposition, but in the reply brief a number of authorities from other jurisdictions are referred to which hold that in

an action for personal injuries, if the evidence shows that plaintiff's conduct willfully contributed to, and was the proximate cause of his injury, he could not recover, even though the defendant was also willfully and wantonly negligent. No case in this state has been cited on this proposition, but it has been repeatedly held by our Supreme Court that where plaintiff sues for damages and his action is based on the wanton and willful negligence of the defendant, negligence on plaintiff's part is not a defense. Waldren Express Co. v. Krug, 291 Ill. 473; Jeneary v. C. A. I. Traction Co., 306 Ill. 392. We think the contention of the defendant cannot be sustained. Moreover, no such theory was advanced in the trial court. From an examination of the record it appears that the jury were instructed that plaintiff might recover although he was guilty of negligence which contributed to his injury, if the jury found the defendant was guilty of willful and wanton negligence, and the court instructed the jury, at the request of the defendant, that the only duty imposed upon the defendant, plaintiff being a trespasser, was to refrain from wantonly and willfully injuring him. No instruction was given or requested on behalf of the defendant embodying the contention now made. It is, therefore, clear that the point now made is an afterthought, and under the record cannot be raised for the first time in this court.

The defendant further contends that the court erred in permitting the reading of depositions to the jury. The record discloses that plaintiff had brought an action against the railroad for the accident in question and while it was pending the depositions of a number of witnesses

were taken at South Bend, Indiana, upon stipulation of the parties, waiving the statutory notices; that plaintiff had sometime made a motion for a change of venue from the judge before whom the case was then pending, which motion was denied; that afterwards the case came on for hearing and the defendant appeared with a number of its witnesses from Indiana, and shortly before the case was called, plaintiff's counsel advised counsel for defendant that he would not appear in court, but would permit the case to be dismissed for want of prosecution. Shortly thereafter the case was called and plaintiff failing to appear the suit was dismissed for want of prosecution and the next day the instant case was begun. During the trial of the instant case plaintiff offered to read the depositions of the witnesses which had theretofore been taken. This was objected to by the defendant, not on the ground that he had been taken by surprise, nor on the ground that counsel for the defendant had not cross-examined the witnesses, but because the depositions were taken in a different case. The objection was overruled and we think properly so. Wade v. King, 19 Ill. 300; Pratt v. Kendig, 128 Ill. 293.

In the Wade case it was held that depositions taken in a former suit between the same parties involving the same questions were properly read in evidence, if the parties interested had an opportunity of testing the truth of the testimony by cross-examining the witnesses.

In the Pratt case depositions were held properly read in a case where they had been taken in another suit

where the witnesses had been cross-examined and the issues between the parties were substantially the same.

In the instant case the issues are identical. Moreover, there was little that was material that was testified to by these witnesses as we view the case. Most of the depositions were as to whether plaintiff had slipped or fallen, which we have said is immaterial. Other parts of the depositions were concerning matters about which there is little or no controversy.

The defendant further contends that the court erred in overruling its objections to the introduction of evidence of an ordinance of the City of South Bend, which ordinance was in reference to the speed of trains and the ringing of bells. This ordinance was set up in one count of the declaration and we think it was proper that it be received in evidence. It was an element that the jury might properly consider in determining the question whether there was wanton and willful negligence. Blanchard v. L. S. & M. S. Ry. Co., 126 Ill. 416; Bremer v. L. E. & W. R. R. Co., supra; I.C. R. R. Co. v. Leiner, 202 Ill. 624; Jones v. Kramer, 336 Ill. App. 362.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. CONCURS;
THOMSON, J. DISSENTING;

I do not agree with the foregoing decision of this case. In my opinion the trial court erred in admitting the depositions, referred to in the majority opinion, over

defendant's objection. That objection covered all the depositions which the court admitted, including the deposition of the witness, Kaczorowski. These depositions would not have been admissible over objection, even in the first case the plaintiff brought against this defendant - the case in which they were taken, - except for the stipulation which the defendant had made in that case, to the effect that they might be read in evidence in the trial of that case, - for admittedly they had not been taken pursuant to the provisions of the statute. A fortiori, they could not be admitted in the case at bar, unless the defendant had made some such stipulation here, which it has not.

Complainant argues that "this is a highly technical point, and one that will not appeal to the conscience of the Court very strongly." In my opinion, it hardly lies in the mouth of plaintiff to complain of technical points or to appeal to the conscience of the court, when the record shows that when his first case brought against this defendant on account of the injuries received by him in this accident, was pending, - that being the case in which defendant stipulated these depositions might be taken and in the trial of which, they might be read - plaintiff tried to remove it from the call of the judge before whom it was pending, by petitioning for a change of venue. Failing in that, on the morning it was to be reached for trial, his counsel notified counsel for defendant he would not appear in court but would let the case be dismissed for want of prosecution. Defendant's witnesses had been brought here from South Bend, and defendant was ready

for trial and appeared when the case was called. But plaintiff let the case go to a dismissal by not appearing and the following day started his case over again, - the case at bar. In my opinion the stipulation which the defendant had seen fit to enter into in the first case, to the effect that the testimony of certain witnesses might be taken by deposition and read in that case, should not be given any effect in this case. Such was the holding in the only instance in which the question seems to have arisen prior to this time in our state. Armeny v. Madson & Buck Co., 111 Ill. App. 621.

Further, I am of the opinion the trial court erred in denying defendant's motion for a peremptory instruction. Giving the plaintiff the benefit of all the evidence in his favor, in its most favorable aspect to him, and of all the presumptions that may be reasonably drawn from such evidence, and rejecting all contradictory evidence or explanatory circumstances, as we must, in considering this question,(Waldren Express Co. v. Krug, 291 Ill. 478), it seems to me there is no evidence in the record showing or fairly tending to show such gross want of care, as could reasonably be held to indicate a willful disregard of consequences on defendant's part.

The engineer saw the plaintiff when he was some distance away. He blew the locomotive whistle for certain street crossings. When he was 200 feet from the plaintiff, he blew a warning whistle. At that time the plaintiff was ten feet from the end of the fence. He was walking in the path and entirely clear of the defendant's train. He had not reached the point where the path led in between the defendant's tracks and the fence. Whatever danger he may have been in after he passed the corner of the fence, he certainly was in none before then. The bell on the locomotive was ringing. The only

evidence submitted by the plaintiff as to the blowing of the whistle and the ringing of the bell, was purely negative in character, and not such, in my opinion, as to make an issue for the jury on those questions. St. L. A. & T. H. R. R. Co. v. Manly, 58 Ill. 300; Rich v. C. M. & St. P. Ry. Co., 149 Fed. 79.

When the engineer was 200 feet away, overtaking the plaintiff as he walked along the path and before he had reached the fence, the engineer had every reason to believe he heard the train approaching, and that he would not deliberately walk into a place of danger. For all the engineer knew, or could reasonably be expected to foresee, the plaintiff would walk obliquely to the right, down the alley, as he approached the fence. That way was there open to him. Or if not, that the plaintiff, upon reaching the point where the path led in between the track and the fence, would pause and await the passing of the train. The train must have been very close to that point when it became apparent that the plaintiff was not going to pause there but was going on, in the path along the fence. The plaintiff was ten feet away from that point when the engineer was about 200 feet away. The train was going about fifteen miles an hour. According to the plaintiff's own testimony, he had just passed the corner of the fence when the accident happened. He testified he "just remembered passing the end of the fence and then being hit."

That is all there is to the plaintiff's case and in my opinion, such a situation presents nothing whatever showing or tending to show a willful and wanton disregard of plaintiff's safety, by the engineer.

Furthermore, even if we should hold that the engineer could not reasonably suppose the plaintiff would not enter the space occupied by the path where it led along the fence, until the train had passed, but should have anticipated that he would walk ahead and be in that space when the train reached him, - even in that situation, I am of the opinion that it may not reasonably be said, from all the evidence for the plaintiff, that in going ahead, the engineer was guilty of willful and wanton conduct. I do not believe the evidence, taken most strongly for the plaintiff, shows that, or tends to show it.

The train was not moving at a high speed. One cannot look at plaintiff's own exhibit one, and believe that he could not easily have walked in the path along the fence and not been struck by the train. Even if in exercising his judgment to that effect, the engineer was mistaken, he may not reasonably be considered so grossly mistaken as to be guilty of willful and wanton negligence in assuming that fact.

But even if the issue of willful and wanton negligence was one on which the trial court could not properly give a peremptory instruction, I am further of the opinion that the jury's finding that there was such negligence and that it was the proximate cause of plaintiff's injury, is against the manifest weight of the evidence. In my opinion, the evidence shows by a very clear preponderance that the engine did not run into the plaintiff but, as it was passing, he slipped and fell against the engine cylinder.

It would extend this opinion beyond reasonable length to analyze the evidence on this question. Every witness, in a position to testify accurately on the point, supports this statement. Even the plaintiff himself has stated so repeatedly both in writing and orally, - writing admitted to be his, - statements, none of which he denies, but some of which he says he does not remember. The plaintiff further said, in several of those statements, that he heard the train approaching and relized it was coming on this track when it was "25 or 30 car lengths" away, - "maybe more," and that if he had not slipped, "I would have been all right."

Counsel for the plaintiff contend that it would make no difference on the question of defendant's liability, even if the plaintiff did slip. In this connection counsel say in their brief, "If, on the discovery of the presence of the train by Morgan, just as it was practically on top of him, he made an effort to get away from the train, or simply being frightened by the sudden presence of the train, he slipped and fell, it could not be claimed that the reckless, willful and wanton running of the train past the plaintiff, was not the proximate cause of the plaintiff's injury." The difficulty with that contention is that it is entirely unsupported by any testimony of the plaintiff himself, and is wholly inconsistent with a number of statements made by the plaintiff to others after the accident happened, some of which he admits and others of which he says he does not remember. There is no evidence of any kind in the record which, in my opinion, supports such a theory.

439 - 30703

CLAUS S. CLAUSSEN, ET AL,
Appellees,

v.

FRANK B. BUSZIN,
Appellant.

243 I.A. 605

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought an action of forcible detainer against the defendant to recover possession of certain premises located in Chicago, Cook County, Illinois. The case was tried before the court without a jury and at the close of the plaintiffs' case, the defendant offered no evidence, there was a finding in plaintiffs' favor and the defendant appeals.

The record discloses that defendant was in possession of the premises in question and that he and his wife made and delivered a quit claim deed, conveying the property to plaintiffs. Plaintiffs also offered evidence tending to show that this conveyance was made to secure the payment of money borrowed by the defendant from plaintiffs, and that afterwards plaintiffs advanced other sums of money in accordance with an oral agreement entered into between plaintiffs and the defendant. Plaintiffs' position seems to be that by virtue of this oral agreement and the payment of money by plaintiffs, the title conveyed by the quit claim deed became absolute in plaintiffs.

The defendant contends that where a deed is given,

Appellant,

v.

FRANK B. BUCKLIN,

Appellant.

Opinion filed Oct. 13, 1896.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

but which in reality is in the nature of a mortgage, before it can be converted into an absolute conveyance the transaction between the parties must be fair and clearly established by the evidance and a further contention of the defendant is that the action will not lie because plaintiff failed to give the defendant notice as required by the 6th paragraph of section 2 of the act in relation to Forcible Entry and Detainer. Whether the evidence offered by plaintiff as to the oral agreement entered into between the parties subsequent to the execution of the quit claim and that several sums of money were paid out by plaintiffs under this agreement, was admissible in an action of forcible entry and detainer, we do not decide. Lencki v. Schultz, 198 Ill. App. 284. We think that the second point made by the defendant, viz. that the action will not lie because plaintiffs had not been given the notice as required by paragraph 6 above referred to must be sustained. Sec. 2 of Chap. 57, Cahill's Statutes provides that an action of forcible entry and detainer will lie. "Sixth - When lands or tenements have been conveyed by any grantor in possession * * * and the grantor in possession * * * refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto or his agent." In construing this section it has been held that a written demand is a pre-requisite to the maintenance of such an action. Benjamin v. Allison, 201 Ill. 34. The court there said (p.36) "The action of forcible entry and detainer, or forcible detainer, being special statutory proceedings, summary in their nature and in derogation of the common law, the statute conferring such jurisdiction must be strictly pursued in the method of procedure prescribed by it or jurisdiction

will fail to attach. Fitzgerald v. Quinn, 165 Ill. 355, 360; French v. Miller, 136 Ill. 611.

"A demand in writing is an essential prerequisite before bringing an action of forcible detainer by a purchaser of premises at sale under execution or decree, or those claiming under him. Dickason v. Dawson, 85 Ill. 53; Brackensieck, v. Vahle, 48 Ill. App. 312; Lehman v. Whittington, 8 Ill. App. 374; Jennings v. Jennings, 94 Ill. App. 26."

In the case at bar the evidence discloses, without dispute, that defendant, at the time he executed the quit claim deed, was in possession of the premises and, therefore, a "grantor in possession" and the case falls clearly within paragraph 6 of section 2 of the statute above quoted. And since that paragraph specifically requires that before an action of forcible detainer will lie, a written demand for possession must be made on the defendant, and this not having been done the judgment is wrong and must be reversed. Counsel for plaintiffs contend that while ordinarily a demand, in writing, must be made before an action of forcible detainer will lie, yet this is not the law where it appears that the defendant in possession repudiates thetitle of plaintiff to the property. In support of this the case of Tole v. Tole, 149 Ill. App. 311, and other cases are cited.

In the Tole case a father had rented certain lands to his son. His son moved on to the land and occupied it for the period agreed. The son having refused to pay rent, the father told him he would have to sign a written lease or vacate the premises. This the son failed to do, but on the

will fail to attach. Kitchenaria v. Union, 160 Ill. 228, 240; Ewart v. Miller, 136 Ill. 61.

[illegible] a demand in writing is an essential prerequisite before bringing an action of forcible detainer by a purchaser of premises at sale under execution or decree, or those claiming under him. Hickman v. Bowen, 99 Ill. 83; Brandenstein v. Tuohy, 46 Ill. App. 218; Fishman v. Whittington, 8 Ill. App. 394; Jennings v. Hennion, 84 Ill. App. 88."

In the case at bar the evidence discloses, without dispute, that defendant, at the time he executed the quit claim deed, was in possession of the premises and, therefore, a "remainder in possession" and the case falls clearly within paragraph 8 of section 2 of the statute above recited. And since that paragraph specifically requires that before an action of forcible entry will lie, a written demand for possession must be made on the defendant, and this not having been done the judgment in favor and must be reversed. Counsel for plaintiffs contend that while ordinarily a demand, in writing, must be made before an action of forcible detainer will lie, yet this is not the law where it appears that the defendant in possession repudiates the title of plaintiff to the property. In support of this [illegible] a number of Illinois decisions are cited.

In the Tate case a division had vested certain lands in [illegible]. His son moved on to the land and continued to live there with him he would have to sign a written lease or for the period agreed. The son having refused to pay rent

view to the premises. This the man failed to do, but on the

contrary, claimed that the property belonged to him and his sister. The father then brought an action of forcible detainer without having previously made any demand on the son for possession of the premises and obtained judgment. On appeal to this court, it was contended that the action would not lie, because no demand had been made prior to the beginning of the suit, but the court held that notice was unnecessary and said (p.315) "As appellee disputed appellant's title, repudiated the tenancy and asserted title in himself and sister, he was not entitled to any notice before a suit in forcible detainer could be brought," and quoted from the case of Doty v. Burdick, 83 Ill. 473. In the Tole case it further appears that the son had obtained possession from the father and that that case was not based on paragraph 6 of section 2 of the Forcible Detainer Act, and further the law under which that suit was brought did not provide that a demand be made. While in the instant case paragraph 6 expressly provides that a demand in writing be made. So far as we have been able to find, it has never been held that an action of forcible detainer which is brought under paragraph 6 of section 2 will lie without a written demand having been made as the statute requires. The Doty case referred to in the Tole case was not brought under the provisions of paragraph 6 of section 2.

Plaintiffs having failed to give the notice specifically required in paragraph 6, the action will not lie and the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

448 - 30712

SAMUEL KLEIN,
Appellant,

v.

MR. FRANCIS LOW CORBIT,
Appellee.

243 I.A. 605

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant seeking to recover damages claimed to have been sustained by reason of his automobile being struck and damaged by the defendant's automobile which was being negligently driven by defendant's chauffeur. At the close of all the evidence on motion of the defendant the court instructed the jury to find in favor of the defendant. A verdict was returned accordingly, judgment entered and plaintiff appeals. Since there must be a re-trial of this case, we refrain from discussing the evidence more than we deem necessary in stating the reasons for our decision.

It appears from the evidence that at about 8:45 o'clock in the forenoon of August 26, 1921, plaintiff was driving his Packard automobile in an easterly direction in Stockton Drive which is located in Lincoln Park and the defendant's car was being driven in a westerly direction in the same drive. And when the two cars were nearly opposite Astor street defendant's car was turned south toward Astor street and collided with plaintiff's car causing the damage complained of. The evidence further tends to show that the chauffeur who was driving defendant's car at the time

Opinion filed Oct. 17, 1924.

of the collision had been in the employ of the defendant for three or four weeks prior to that time. Defendant lived in Oak Park with her husband and it was the chauffeur's duty, among other things, to drive defendant's husband from his home in Oak Park to his place of business, which was located at No. 116 West Adams street, Chicago. On the morning of the accident, the chauffeur had driven plaintiff's husband from his home to his place of business and shortly thereafter the collision took place in Stockton Drive, which is about a block north of the south end of Lincoln Park. Defendant and her husband both testified that they had not seen the chauffeur after the accident. She further testified that she last saw him when he left her home on that morning of the accident to drive her husband to his office. And the defendant's husband testified that he had last seen the chauffeur when he left his place of business on the morning in question. It further appears from the testimony of the defendant and her husband that the chauffeur performed the ordinary duties of a chauffeur in driving and taking care of the automobile and in addition other duties around defendant's home in Oak Park.

Defendant's husband testified that he bought the automobile for his wife, but that it was paid for by her; that the chauffeur was in her employ, but was directed by her to take orders from him and that he obtained the state license for the automobile on behalf of his wife, the license being in her name. He further testified that the chauffeur had been driving him to his place of business for three or four weeks prior to the accident, arriving at his office, No. 116 West Adams street about 8:30 or 9:00 o'clock in the morning and returning for him to take him back to his home

in Oak Park about 2:15 to 2:30 in the afternoon; that on the day in question he arrived at about the usual time at his place of business and told the chauffeur to take the car to Grant Park and return at 11:00 o'clock with the automobile to take him home; that he did not direct the chauffeur to go to Lincoln Park on the day in question and that he had no business for the chauffeur to do in the park and plaintiff testified that she had no errand or work to be done in Lincoln Park on that day and did not direct him to go there.

Plaintiff contends that the court will not take judicial notice as to the location of No. 116 West Adams street, Chicago, Grant Park and Lincoln Park, and that since there is no evidence in the record on this subject, it must be presumed that the chauffeur was on his way from 116 West Adams street to Grant Park with the car, carrying out defendant's husband's instructions.

It is true that courts of this state will not take judicial notice that certain streets mentioned in the record are located in any particular city. But in the case at bar, defendant's husband said he lived in Oak Park and that his place of business was at "116 West Adams street, in Chicago," and that he told the chauffeur to take the car to Grant Park and return for him at a given hour. There is no denial of the fact that the plaintiff's car was damaged in collision with the car belonging to the defendant, in Lincoln Park. This court will take judicial notice of the relative locations of Grant Park and Lincoln Park in the City of Chicago and of the suburb, Oak Park, where the defendant lived.

We think the court was in error in directing the jury to find for the defendant. The defendant argues in this court that the evidence is insufficient to show that the defendant owned the Cadillac automobile that was being driven by the chauffeur that collided with plaintiff's car, and that the evidence fails to disclose that the driver of the car was defendant's chauffeur. We think this contention is clearly contrary to the evidence. The evidence was sufficient to warrant the submission of the case to the jury. In fact an examination of the record shows that there was little or no contention on the trial, but that the automobile belonged to the defendant and was being driven by her chauffeur.

Even if we assume that there was no evidence that the driver of the Cadillac was defendant's chauffeur, the presumption is that the one in charge of the Cadillac car, at the time of the collision, was in the employ of the defendant and was engaged in and about the defendant's business. Howard, Admx v. Amerson, 236 Ill. App. 587; Regal v. Forschner, Illinois Appellate Court, First District, case No. 30390, not yet reported. Opinion filed, March 10, 1936. In an effort to overcome plaintiff's prima facie case, the defendant introduced testimony to the effect that she had no business requiring her car to be where it was at the time it collided with the plaintiff's car. But such testimony did not establish conclusively, as a matter of law, that her chauffeur was not engaged in and about her business at the time of the collision. In spite of directions given the chauffeur by the defendant's husband, he may have been returning to the defendant's home in Oak Park, and while he may have been taking an indirect route, he might still be said to be engaged in and about the

defendant's business. It was for the jury to say from all the facts and circumstances in evidence, whether the chauffeur was or was not engaged in the defendant's business at the time in question. In the late case of Shannon v. Nightingale, 321 Ill. 166, the plaintiff was suing the defendants for injuries received in an automobile collision, and the defendants, by way of defense, contended that the person who was driving the truck that ran into the plaintiff was not their servant. In the course of the opinion of the Supreme Court, in that case, it was pointed out that the plaintiff made out a prima facie case by his proof. The court then said: "Contrary evidence was introduced by the plaintiffs in error (defendants) but that contrary evidence could not be considered on their motion to direct a verdict in their favor. If the condition of the evidence at the close of the plaintiff's case does not justify an instruction for a verdict in favor of the defendant, no evidence which the defendant may introduce will justify such instruction except uncontradicted evidence of an affirmative defense." Evidence may not be said to be uncontradicted where there are circumstances before the jury which might justify them in disbelieving it, or reaching the conclusion that it was not correct or accurate. Such, in our opinion, is the situation here. The question of whether the chauffeur who was driving the Cadillac car at the time it collided with the plaintiff's car, was at that time engaged in and about the defendant's business, was a question of fact which should have been submitted to the jury.

The judgment of the Superior Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

457 - 30731

HARRY T. EVANS,

Appellee,

v.

JOSEPH GODER AND A. H. MOOREHOUSE, Co-partners, doing business as The Chicago Incinerator Company,

JOSEPH GODER,

Appellant.

243 I.A. 605

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against Joseph Goder, A. H. Moorehouse and E. W. Ritter, co-partners, doing business as the Chicago Incinerator Company. Ritter alone was served with process, he filed an affidavit of merits denying that he was a member of the defendant partnership. The suit was dismissed as to him and alias summons issued and served on the defendant Goder. There is no return by the bailiff as to the defendant Moorehouse, although it is stated by counsel for plaintiff that he was not served. Goder filed an affidavit of merits. Plaintiff afterwards filed an amended statement of claim against Goder and Moorehouse as co-partners, wherein he set up that he was employed by the defendants as a salesman and was to be paid a commission of 30 percent on sales made by himself against which certain expenses were to be charged. The statement of claim then set up in detail the commissions claimed to have been earned by plaintiff aggregating

24371A. 6095

Opinion filed Dec. 13, 1938.

$8785.00 from which there should be deducted $4891.36, leaving a claimed balance due plaintiff of $3893.64. There was a paragraph of the statement of claim based on a quantum meruit. The statement of claim further set up that the defendants had rendered to plaintiff a statement of his account which was set out in detail, showing a balance due from defendants to plaintiff of $2699.05.

Coder in his affidavit of merits set up that plaintiff was employed by the defendants for a period of five years to act as salesman and was to receive for his services 20 percent of the sales made by himself; that if any statement was rendered by the defendants to plaintiff it was prepared under a misapprehension of fact; that in the preparation of this statement the defendants were under the erroneous misapprehension that plaintiff was to receive commissions of 20 percent on all sales made by the defendants and denied that they owed him any money. Shortly before the trial, the defendant Coder, by leave of court filed a setoff, wherein he claimed that defendants had overpaid plaintiff $2393.00. The jury returned a verdict in favor of plaintiff against defendants for the amount of plaintiff's claim, viz. $3893.64. On motion for a new trial the court required a remittitur of $1835.00 and entered judgment for the balance of $2058.64.

On the trial plaintiff introduced in evidence the statement prepared by the defendants showing the state of plaintiff's account with the defendants and showing a balance due from defendants to plaintiff of $2699.05. This was the statement which was set up in full in plaintiff's statement of claim. The defendant contends that it was erroneous to

admit this document for the reason that the evidence showed that the statement of account was prepared by Moorehouse without the knowledge of the defendant Goder, after Goder had severed his connection with the defendant co-partnership, and that under the law an admission made by one partner after the dissolution of the partnership is inadmissible to show partnership transactions which occurred prior to the dissolution. An examination of the record discloses that it is obvious that this contention is an afterthought as no mention of this point was made or even suggested on the trial. When the document was offered, the defendant contended that it was inadmissible because it was prepared under a misapprehension of fact; and that it was disputed in the ~~defendants affidavit of merits~~ plaintiff's statement of claim. The defendant having taken that position on the trial will not be permitted in this court to contend, for the first time, that the statement was prepared after the partnership was dissolved.

The defendant further contends that the court erred in admitting evidence over his objection which was inconsistent and at variance with the allegations of plaintiff's statement of claim and in support of this, it is said that plaintiff in his statement of claim alleged that he was entitled to commissions on sales made by himself, while he offered evidence tending to show that he was entitled to commissions on all sales made by the co-partnership whether he was instrumental in procuring the sales or not. When this question arose on the trial, plaintiff stated that he would amend his statement of claim to conform with the evidence and the court instructed the jury on the theory that if they believed from the evidence that

plaintiff was entitled to commissions on all sales made by the defendant co-partnership, they should take into consideration all the sales made, while on the other hand, if they were of the opinion from the evidence that plaintiff was only entitled to recover for the sales actually made by him, they should base their verdict on that theory. In other words, the instruction was based on the theory that the amendment had been made. The instructions apparently were oral and no objection was made to the instruction nor is any made on that ground in this court. Since the case was tried and submitted to the jury on the theory that the amendment had been made, we think the court was entirely warranted in allowing the amendment to be actually made after verdict.

A further point is made that the court made improper and prejudicial remarks during the progress of the trial to the effect that if plaintiff had shown certain facts, he would make out a prima facie case. We have carefully considered the record on this point and think it is entirely without merit. The court had in mind the order in which the evidence should be produced, whether in chief or in rebuttal.

A further point is made that the court erred in refusing to direct a verdict for the defendant at the close of plaintiff's case. This point was waived by the defendant introducing evidence in his own behalf. In this connection, counsel for defendant points out what he contends is a variance between the allegations of plaintiff's statement of claim and the evidence, in that the allegations as to certain items and the evidence offered in support of them do not agree. The court eliminated a number of items on the motion for a new trial

and required that the total of them be deducted from the verdict, which was accordingly done. We think it would serve no useful purpose to discuss this contention in detail, but that it is sufficient for us to say, we feel we would not be warranted in disturbing the judgment.

The defendant further argues that the court erred in excluding competent evidence offered by him. When the defendant was testifying, it was sought to show by him that there had been a mistake made in the statement rendered by defendants to plaintiff as to the state of his account. The defendant was asked by his counsel in this connection, how it had happened that the defendants had paid $3713.00 when defendant in his setoff claimed plaintiff was only entitled to $1425.00. Objection was sustained to this question and other similar questions and the court suggested that the defendants produce the cancelled checks by which defendants paid plaintiff. This suggestion was adopted by counsel for the defendant and later the checks were produced and the defendant then in his testimony admitted that he could not explain the payments made. And it also appeared from defendant's testimony that he knew nothing about the keeping of the books of the defendant corporation. We think there is no merit in the contention made.

Defendant further contends that the court erred in giving improper instructions on behalf of plaintiff and particular complaint is made against two of such instructions. The complaint made to one of these instructions is that it left the question to be determined by the jury whether plaintiff was to receive commissions on all sales or only on those made by himself. In view of what we have said above, we think

the court was warranted in giving the instruction. The other instruction told the jury, among other things, that if they found plaintiff was paid more than he was entitled to receive, then they should allow the defendant credit for such amount if any, and "If you decide not to allow the plaintiff anything, then you may give a verdict against the defendant for such amount, if any, as you may decide he has been paid in excess of what is due him." We think the instruction is not well drawn, but we are also of the opinion, upon a review of the entire record that the jury were in no way misled by the instruction. Furthermore, as the instructions were apparently oral, any objection to them should have been pointed out at the time.

The defendant further contends that the verdict is contrary to the manifest weight of the evidence and that the special finding of the jury is contrary to the manifest weight of the evidence. The defendant contends that the evidence shows that the contract between the parties was for a period of five years and since it was not in writing, it was void under the statute of frauds. The evidence as to whether the contract was for a period of five years, or whether it was agreed between the parties that plaintiff would work for the defendants for a period of five years subject to the condition that it might be terminated at any time, upon sixty days' notice being given by either party, was conflicting. Plaintiff's evidence being to the effect that the agreement contained a provision that it might be terminated upon sixty days' notice, and the defendant give evidence to the contrary. The credibility of the witnesses was for the jury. And upon a

careful consideration of all the evidence in the record, we are clearly of the opinion that we would not be warranted in disturbing the verdict or the special finding on the ground that either was against the manifest weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. and THOMSON, J.J. CONCUR.

468 - 30732

THE S. & S. FUEL CO., Appellee,

v.

JOHN B. KAUSAL COAL COMPANY, Appellant.

243 I.A. 606

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover the purchase price of five carloads of coal which it had sold and delivered to the defendant. The issues were madeup by plaintiffs' statement of claim and the affidavit of merits and when the case was reached for trial a jury was impanelled, and the court held that it was incumbent on the defendant under the pleadings to proceed with its evidence. This the defendant refused to do, and the court, on motion, instructed the jury to find in favor of the plaintiff for the amount of its claim. A verdict was accordingly returned, judgment entered on the verdict and the defendant appeals.

It seems to be agreed in the briefs that plaintiff in its statement of claim alleged that it sold to the defendant five carloads of Pennsylvania Smokeless coal at certain named prices; that the coal was delivered by the plaintiff and received by the defendant, and that defendant had not paid for it. The defendant in its affidavit of merits admits that it received the five carloads of coal, but avers that the coal ordered by it was to have been of a pure grade and quality and free from foreign substance and further avers that

JOHN E. KANAWHA COAL COMPANY,
Appellant,

v.

THE C. & O. RAIL. CO.,
Appellee.

2431.A. 606

APPEAL FROM
MERCER COUNTY
OF WEST VIRGINIA.

Opinion filed Oct. 15, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover the purchase price of five carloads of coal which it had sold and delivered to the defendant. The issues were made up by plaintiff's statement of claim and the affidavit of merits and when the case was reached for trial a jury was impaneled, and the court held that it was incumbent on the defendant under the pleadings to proceed with its evidence. This the defendant refused to do, and the court, on motion, instructed the jury to find in favor of the plaintiff for the amount of its claim. A verdict was accordingly returned, judgment entered on the verdict and the defendant appeals.

It seems to be agreed in the briefs that plaintiff in its statement of claim alleged that it sold to the defendant five carloads of Pennsylvania Smokeless coal at certain named prices; that the coal was delivered by the plaintiff and received by the defendant, and that defendant had not paid for it. The defendant in its affidavit of merits admits that it received the five carloads of coal, but avers that the coal ordered by it was to have been of a pure grade and quality and free from foreign substance and further avers that

the coal received was impure and contained foreign substance such as slate, rock, bone, stones and shale.

Plaintiff alleged that it sold and delivered to the defendant five carloads of Pennsylvania Smokeless coal at certain prices and the affidavit of merits admits that defendant received the five carloads of coal, and it is not denied that the coal was Pennsylvania coal. It is an elementary ruling of pleading that in an action at law that an allegation made by the plaintiff and admitted or not denied by the defendant is admitted to be true and needs no proof. Hopkins v. Medley, 97 Ill. 402. Under the pleadings, therefore, it stood admitted of record that plaintiff had sold and delivered to the defendant five carloads of Pennsylvania Smokeless coal at a certain designated price. It is also a rule of law that where a defendant accepts goods and refuses to pay for them because he claims that the goods are not of the quality called for by the contract, the burden is upon him to prove such lack of quality. Morris v. Wibaux, 159 Ill. 627; Burt v. Garden City Sand Co., 237 Ill. 473; Goodlatte v. Acme Sales Corporation, 329 Ill. App. 610; Santa Rosa-Vallejo Tan Co. v. C. Kronauer & Co., 228 Ill. App. 533.

In the Morris case plaintiff sued to recover the purchase price of cattle which he had sold and delivered to the defendant. The court there held that it was incumbent upon the plaintiff to prove that it had delivered cattle of the identical character called for by the contract and said (p.641) "then if appellant (defendant) set up in his pleas that the cows were not dry or the steers were not good merchantable steers, he would assume the burden of proving his pleas."

In the Hart case, it was held in an action brought to recover the balance due for cement delivered to the defendant under a contract warranting cement to be of a certain quality, that if the defendant claimed that the cement was not of the quality called for by the contract, the burden was upon him to prove such fact. And in the Goodlatte case, plaintiff brought suit to recover the purchase price for certain merchandise sold and delivered to the defendant. The defense was that the merchandise was not of the quality purchased. We there said, (p.612) "In this state of the pleadings it is obvious that the burden of proving the goods were not up to the sample was upon the defendant." The same rule was followed by this court in Santa Rosa-Vallejo Fan Co. case.

Since it stood admitted by the pleadings that the defendant had received from the plaintiff five carloads of Pennsylvania Smokeless coal and since the defense set up was that the coal was valueless by reason of the fact that it contained foreign substances, the burden of proof was upon the defendant to sustain its defense, and it having failed to produce any evidence, there was nothing for the court to do but to direct a verdict for the plaintiff as was done.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, P.J. CONCUR.

502 - 30766.

F. GLESNER,
Appellee,
v.
W. A. NICHOLSON,
Appellant.

243 I.A. 606

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, the payee of a promissory note dated July 1, 1919, due four months after date for $450.00 with interest at 6 per cent, brought suit against the defendant, the maker of the note, to recover its face value with interest. The defendant admitted the execution of the note, but filed a setoff based on another promissory note dated March 19, 1914, for $1600.00, made by plaintiff and his wife, payable to their order and by them endorsed and delivered to the defendant. The note was due on or before five years after date. There were five interest coupons for $96.00 each. The jury rendered a verdict in favor of plaintiff on his statement of claim for $609.86 and against the defendant on his setoff. Judgment was rendered on the verdict and the defendant appeals.

The record discloses that plaintiff owned a two flat building in Chicago and the defendant a farm in Wisconsin, and on or about March 9, 1914, defendant who was an architect and builder and also engaged in the real estate business, traded the farm to plaintiff for the flat building. The building was valued at $3400.00 and the farm at $10,000.00

P. CLEMENT,

Appellant,

v.

V. A. ELECTRICOR,

Appellant.

2431.A. 606

APPEAL FROM

SUPREME COURT

OF ONTARIO.

Opinion filed Oct. 18, 1928.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

PLAINTIFF, the payee of a promissory note dated July 1, 1919, due four months after date for $600.00 with interest at 8 per cent, brought suit against the defendant, the maker of the note, to recover its face value with interest. The defendant admitted the execution of the note, but filed a setoff based on another promissory note dated March 18, 1924, for $1800.00, made by plaintiff and his wife, payable to their order and by them endorsed and delivered to the defendant. The note was due on or before five years after date. There were five interest coupons for $96.00 each. The jury rendered a verdict in favor of plaintiff on the statement of claim for $600.86 and against the defendant on his setoff. Judgment was rendered on the verdict and the defendant appeals.

The record discloses that plaintiff owned a two [illegible] in Chicago and the defendant a farm in Wisconsin, and on or about March 3, 1924, defendant who was an architect and builder and also engaged in the real estate business, traded the farm to plaintiff for the flat building. The building was valued at $1800.00 and the farm at $1,400.00

and as a part of the consideration, plaintiff and his wife executed two mortgages, securing two principal notes, one for $5,000.00 and one for $1800.00, the latter being the basis of defendant's setoff. Shortly after the deal was made, the defendant and his wife moved to the farm in Wisconsin and stayed there about nine or ten months and apparently made a failure of farming and returned to Chicago. Plaintiff testified that when he returned to Chicago, which was about ten months after he had moved to the Wisconsin farm, he saw the defendant and advised him of the fact that plaintiff had made a failure of his farm adventure and that defendant then stated that he had a piece of property in Chicago which he would sell to the plaintiff so that plaintiff might retrieve some of the loss he had sustained; that plaintiff looked at the property, but did not want it at the price asked; that about that time defendant stated to plaintiff that if plaintiff and his wife would give the defendant a deed for the Wisconsin farm, he would cancel plaintiff's liability on the mortgage notes which was agreed to by plaintiff and his wife; that pursuant to a request from the defendant, plaintiff, his wife and the defendant met at the Woodlawn Trust & Savings Bank, Chicago, and there plaintiff executed a deed and gave it to the defendant; that he did not read the deed, but acknowledged it before a notary public at the bank and was advised that this relieved plaintiff from all liability on the notes and that at no time did the defendant ever demand any payment of either the principal or the interest on the notes; that about five years afterwards, in 1918, plaintiff advised the defendant that he had an automobile for sale and the defendant stated

he would buy the automobile if defendant's family liked the machine; that the machine was examined and it was agreed that plaintiff would sell it to the defendant for $450.00. The defendant thereupon took the machine, but did not pay for it. A day or so later, July 1, 1918, defendant mailed plaintiff his note for $450.00, payable four months after date, which is the note in suit; that after this note became due, plaintiff from time to time made demands for payment, but without success; that the defendant made excuses that his business was poor; that he had no money and that there was a strike on; that he expected his business to pick-up so that he would be able to pay the note; that later on plaintiff endeavored a number of times to see defendant about the payment of the note, but without success and finally brought suit. At the time of the trial, plaintiff lived in a small village, named Elvena, which had a population of about one hundred inhabitants where he was in the grocery business.

The defendant testified that he never received a deed from the plaintiff and his wife for the Wisconsin farm; that he never told plaintiff that if plaintiff would give him a deed he would cancel the mortgage notes; that he did not meet plaintiff and his wife at the Woodlawn Trust and Savings Bank; that he had given the $5,000.00 note as collateral to the bank and that later the bank forclosed the mortgage; that he had retained the $1600.00 note and had demanded payment of it a number of times from the plaintiff.

We are compelled under the law to reverse the judgment on account of erroneous instructions given by the

court at the request of plaintiff's counsel.

The record discloses that at the close of the evidence there was a discussion between the court and counsel, out of the hearing of the jury, in the presence of the court reporter and that counsel for the defendant objected to instructions tendered to the court by the plaintiff; and that the objections were overruled. Thereupon the court told the jury that he would give them what was known as oral instructions and requested counsel to make objections if they had any at the conclusion. Then follows what appears to be written instructions and at the close of these instructions, defendant's counsel objected to certain ones designating them by number. A number of them told the jury in effect that the execution of a promissory note by one party to another is evidence in law that all prior past due accounts owing from the payee to the maker were settled, without there being accepted. The phrase "without there being accepted" is unintelligible and inapt in every way to the facts in the case at bar. The law as announced was clearly wrong. There is no presumption in the law that if one party gives another his note that all prior accounts between them have been adjusted. Crabtree v. Rowland, 33 Ill. 421; Wheelock v. Berkeley, 138 Ill. 153; Ankeny v. Pierce, Breese (1 Ill) 389.

The evidence in the record which shows without dispute that the defendant made his note and delivered it to plaintiff in July, 1919, which was five years after plaintiff had made his note for $1600.00 and delivered it to the defendant, taken in connection with the other facts in the record, would warrant counsel for plaintiff in arguing to the jury

counsel at the request of plaintiff's counsel.

The record discloses that at the close of the evidence there was a discussion between the court and counsel out of the hearing of the jury, in the presence of the court reporter and that counsel for the defendants objected to instructions tendered to the court by the plaintiff; and that the objections were overruled. Thereupon the court told the jury that he would give them what are known as oral instructions and requested counsel to make objection if they had any at the conclusion. Then follows what appears to be written instructions and at the close of these instructions, defendant's counsel objected to certain ones designating them by number. A number of them told the jury in effect that the presumption of a pecuniary note by one party to another in evidence in law that all prior past due accounts there being accepted. The phrase "without there being evidence in existibible and inapt in every way to the facts in the case at bar. The law as announced was clearly given another pie note that all prior accounts between them have been adjusted. Dunbrack v. Dunland, 22 Ill. 481; Wheeler v. Hatfield, 156 Ill. 138; Ashby v. Pierce, Brooke (1 Ill) 227.

The evidence in the record which shows without dispute that the defendant made five note and delivered it to plaintiff in July, 1919, which was five years after plaintiff had made his note for $1800.00 and delivered it to the defendant, taken in connection with the other facts in the record, would warrant counsel for plaintiff in asking to the jury

that the $1800.00 note had been cancelled and that plaintiff had executed the deed as he testified, but it would not warrant the giving of the instructions complained of.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

that the $1500.00 note had been cancelled and that plaintiff
had executed the deed in testimony, but it would not
warrant the giving of the instructions complained of.

The judgment of the district court of Oswego is
reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, J. . ANN HUDSON, J. DISSENT.

511 - 30775

FERGUSON & LANGE FOUNDRY COMPANY, a corporation,

Appellant,

v.

JACOB FRANKS,

Appellee.

243 I.A. 606

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $1,000.00 claimed to be due it for installing hot water heaters in a building belonging to the defendant. There was a trial before the court without a jury and a finding and judgment in favor of the defendant and plaintiff appeals.

The record discloses that defendant was the owner of a large apartment building, located at the corner of Hyde Park Boulevard and Ingleside Avenue, Chicago, which was occupied by a number of tenants to whom defendant furnished hot water by means of a water heater which was separate and distinct from the boiler plant which the defendant used to heat the building. Plaintiff proposed to the defendant that it be permitted to install hot water heaters which would be connected with the boiler used in heating the building and on September 11, 192[illegible], the parties entered into a written agreement, whereby plaintiff was to furnish and install hot water heaters at a price of $1,000.00. The contract contained the following provisions: "Guarantee: That the heater installed will be of proper size to heat the water for use in the above premises, and a saving

PEMBERTON & TAGGE TOWNSHIP MORTGAGE, a corporation,

Appellant,

v.

JACOB PRATT,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

24231-A. 606

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $1,000.00 claimed to be due it for installing hot water heaters in a building belonging to the defendant. There was a trial before the court without a jury and a finding and judgment in favor of the defendant and plaintiff appeals.

The record discloses that defendant was the owner of a large apartment building, located at the corner of Park Boulevard and Ingleside Avenue, Chicago, which was occupied by a number of tenants to whom defendant furnished hot water by means of a water heater which was separate and distinct from the boiler plant which the defendant used to heat the building. Plaintiff proposed to the defendant that it be permitted to install hot water heaters which would be connected with the boiler used in heating the building and on September 11, 1924, the parties entered into a written agreement, whereby plaintiff was to furnish and install hot water heaters at a price of $1,000.00. The contract contained the following provisions: "Guarantee: That the heater installed will be of proper size to heat the water for use in the above premises, and a saving

of not less than $250 each year, and Jacob Franks to be the sole judge whether this amount is saved."

"Work to be started: As soon as possible, and if the purchaser, Jacob Franks, concludes that a saving of not less than $250. can be made in a year, then on the 1st day of May, 1923, he will pay $1,000 for the equipment. If this saving is not made, the Ferguson & Lange Fdy. Co. is to remove the equipment and leave the boilers in the same condition that they are at the present time." Pursuant to the terms of the contract plaintiff proceeded to install the heaters and the work was completed on October 19, 1922. In doing the work it was necessary to cut holes in the boiler which supplied the heat to the defendant's building and to insert pipes into these holes and then seal the holes up.

The evidence shows that shortly after the work was completed the tenants made complaint that they were not receiving sufficient hot water and thereupon the defendant was required to resume the use of the old water heater. Later from time to time the plaintiff made an endeavor to have the new heaters work properly and it claims that it was successful in this respect. On December 7, 1922, defendant wrote plaintiff a letter wherein he stated that "The contract mentioned, that if a saving of not less than $250. can be made in a year you are to remove the equipment, but, inasmuch, as it is hardly necessary to wait until May 1st, as I am convinced now that there is no saving." The letter further stated that defendant had been advised by the janitor that the tenants were complaining of not having sufficient hot water and continuing the letter said "My water bills have increased considerably since this installation was made, and will, therefore, appre-

of not less than $250 each year, and taxes known to be the

sole judge whether this amount is met."

"Work to be started: As soon as possible, and if the purchaser, Jacob Iverson, considers that a saving of not less than $500. can be made in a year, then on the 1st day of May, 1928, he will pay $1,000 for the equipment. If this saving is not made, the Peterson & Dunbo Co. is to remove the equipment and leave the boilers in the same condition that they are at the present time." Payment to the terms of the contract plaintiff proceeded to install the heaters and the work was completed on October 15, 1928. In doing the work it was necessary to cut holes in the boiler which emptied the heat to the defendant's building and to insert pipes into these holes and then seal the holes up.

The evidence shows that shortly after the work was completed the tenants made complaints that they were receiving insufficient hot water and thereupon the defendant requested to resume the use of the old water heater. Later from time to time the plaintiff made an endeavor to make the new heaters work properly and it claims that it was successful in this respect. On December 7, 1928, defendant made plaintiff a letter wherein be stated that "the contract mentioned, that if a saving of not less than $500. can be made in a year for to remove the equipment, and, inasmuch, as it has not been obtained by the heater that the tenants were complaining of not having sufficient hot water and consuming unnecessarily large quantities of gas, I am notified now that there is no saving." The letter further stated that defendant is willing to wait until May 1st, as I am convinced since this installation was made, and will, therefore, exonerate the letter and "if water still pass increased sufficiently

ciate your removing this equipment as soon as possible." Plaintiff did not reply to this letter and under date of December 19, 1922, defendant again wrote plaintiff, stating that he had been compelled to operate the old hot water heater and requested plaintiff to remove its equipment, and also calling attention to the fact that plaintiff had paid no attention to defendant's letter of December 7th. Again on February 17, 1923, defendant wrote plaintiff referring to the two letters above mentioned, stating in effect that the heaters were not in accordance with the agreement and that the janitor at the building had told the defendant, plaintiff had recently been at the plant endeavoring to make the heater work and the letter then said "Now if this equipment is not removed, I will have it taken out when the weather gets milder and send you a bill for the expense." On February 28, 1923, plaintiff wrote a letter to the defendant in which it stated that "We have never neglected this installation. Our engineers have been on the job continuously and have been trying to locate the trouble in this building." In this letter plaintiff stated that the trouble was with the plumbing and not with the heaters, and advised that plaintiff's engineers were still working on the proposition and that plaintiff believed that before the time expires for the trial period, it would be able to show a saving in accordance with the guarantee made in the contract. This letter further stated that plaintiff believed the defendant was not giving it a fair show by asking it to remove the apparatus before May 1st, when the trial period would expire. Defendant replied to this letter on March 3rd, still complaining about the heaters and saying that "I cannot see my way clear to accept this apparatus." There appears to

see at all clear to accept this situation." There remains to still complaining about the pastures and saying that "I cannot move the equipment before May 1st, when the trial period would expire." Defendant replied to this letter on March 3rd, removing the equipment before May 1st, when the trial period had expired. This letter further stated that plaintiff believed the document was not giving it a fair chance by making it to move a mowing in accordance with the guarantee made in the contract. This letter further stated that plaintiff believed before the time expired for the trial period, it would be able working on the proposition and that plaintiff believed that pasture", and advised that plaintiff's employees were still stated that the trouble was with the plowing and not with the case the trouble in this building." In this letter plaintiff have been on the job continuously and have been trying to remove "We have never negotiated this installation. Our engineers plaintiff wrote a letter to the defendants in which it stated and need now a bill for the expense." On February 28, 1922, moved, I will have it taken out when the weather gets milder the letter when said "Now if this equipment is not the matter at the building pay paid the defendant, plaintiff had recently been at the plant endeavoring to make the pasture made not in accordance with the agreement and that the two letters above mentioned, stating in effect that the on February 17, 1922, defendant wrote plaintiff referring to no attention to defendant's letter of December 19th. Upon sing calling attention to the fact that plaintiff had paid rented and requested plaintiff to remove its equipment, and ing that he had been compelled to operate the old pot motor December 19, 1922, defendant again wrote plaintiff, stat- Plaintiff did not reply to this letter and under date of since long remaining this equipment as soon as possible."

to have been no reply made to this letter, but plaintiff did not remove the equipment, nor offer to do so. There was other evidence tending to show that the heaters could be removed and the holes made in the boiler in connection with the installation of the heaters, be filled up or welded, although there was some evidence tending to show that a new boiler head would have to be procured.

Plaintiff's witnesses gave evidence tending to show that the cost of removing the heaters and welding up the holes in the boilers would be from $100.00 to $300.00. While a witness for the defendant gave testimony to the effect that it would cost $2800.00 to remove the heater and restore the boiler to its original condition. The evidence further shows that if the heaters were removed, they would have no value except as junk. There was further evidence to the effect that defendant afterwards formed a corporation in which he and his family owned nearly all of the stock and that he transferred the building to the corporation and that afterwards the corporation sold and transferred the property to Meyer Abrams.

There is no contention made by plaintiff that the heaters were in accordance with the written agreement entered into between it and the defendant. But the plaintiff contends (1) that since the evidence discloses that the defendant used the heaters after he had rejected them, this nullified his rejection and amounted to a waiver of his right to return the heaters and an election to accept them and pay the purchase price and (2) that the defendant in selling the building, sold the heaters and by this act of ownership, which occurred after the defendant had rejected the heaters, constituted an acceptance

to have been no reply made to this letter, but plaintiff did not remove the equipment, nor offer to do so. There was other evidence tending to show that the heaters could be removed and the holes made in the boiler in connection with the installation of the heaters, be filled up or welded, although there was some evidence tending to show that a new boiler head would have to be procured.

Plaintiff's witnesses gave evidence tending to show that the cost of removing the heaters and welding up the holes in the boilers would be from $150.00 to $200.00. While a witness for the defendant gave testimony to the effect that it would cost $1500.00 to remove the heater and restore the boiler to its original condition. The evid nce shows that if the heaters were removed, they would have no value except on junk. There was further evidence to the effect that defendant leased a corporation in which he and his family owned nearly all of the stock and that he transferred the building to the corporation and that afterwards the corporation sold and transferred the property to Dyer Abrams.

There is no contention made by plaintiff that the heaters were in accordance with the written agreement entered into between it and the defendant. But the plaintiff contends (1) that since the evidence discloses that the defendant used the heaters after he had rejected them, this nullified his rejection and amounted to a waiver of his right to return the heaters and an election to accept them and pay the purchase price and (2) that the defendant in selling the building, sold the heaters and by this act of ownership, which occurred after the defendant had rejected the heaters, committed an conversion

of the heaters and an obligation on defendant's part to pay the purchase price. Numerous authorities are cited which counsel for plaintiff contend support these two contentions. We think it is obvious that neither of them can be sustained. It is clear from the evidence that the heaters were attached to and made a part of the boiler and that defendant could not operate the boiler without involving the heaters, unless they were removed. He was not required to remove the heaters and return them to plaintiff because it was the duty of the plaintiff under the express terms of the contract to remove them in case they were rejected by the defendant. This it failed to do, although defendant had rejected them and repeatedly requested plaintiff to take them out. It is so obvious that plaintiff's contention is without merit that it would be a work of supererogation to refer to the authorities cited, none of which are in any way applicable to the facts in the instant case. We think it is clear that the defendant did not exercise any act of ownership over the heaters when he transferred the building. He was under no obligation to remove them but, as stated, this obligation was upon the plaintiff. Under any view of the law and the evidence, we think it clear that no judgment could stand except one for the defendant.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

of the pasture and an obligation on defendant's part to pay the purchase price. Numerous authorities are cited which counsel for plaintiff contend support these two contentions. We think it is obvious that neither of them can be sustained. It is clear from the evidence that the pasture were attached to and made a part of the realty and that defendant could not operate the dairy without involving the pasture, unless they were removed. He was not required to remove the pasture and return them to plaintiff because it was the duty of the plaintiff under the express terms of the contract to remove them in case they were rejected by the defendant. This it failed to do, although defendant had rejected them and repeatedly requested plaintiff to take them out. It is so obvious that plaintiff's contention is without merit that it would be a waste of consideration to refer to the authorities cited, none of which are in any way analogous to the facts in the instant case. We think it is clear that the defendant did not exercise any act of ownership over the pastures when he transferred the building. He was under no obligation to remove them but, as stated, this obligation was upon the plaintiff. Under any view of the law and the evidence, we think it clear that no judgment could stand except one for the defendant.

The judgment of the Municipal Court of Chicago is affirmed.

ANDERSON.

TAYLOR, P.J. and MCGOORTY, J. concur.

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243 I.A. 606

M. C. DEAN, trading as M. C. Dean & Co.,
Plaintiff in Error,

v.

TILLIE ROSEN,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against Tillie Rosen and Charles Rosen, her husband, to recover $500.00 claimed to be due him as real estate broker's commission for the sale of defendant's property. On motion of plaintiff, the suit was dismissed as to Charles Rosen, the case then went to trial without a jury and there was a finding and judgment in defendant's favor.

The record discloses that Tillie Rosen and Charles Rosen owned a piece of improved real estate in Chicago as joint tenants which they listed with plaintiff for sale. Afterwards plaintiff procured two men who entered into a written agreement to purchase the property on the terms submitted by the defendant. The contract is dated November 17, 1924 and the purchase price was $30,000.00, $1,000.00 of which was paid down as earnest money at the time the purchasers signed the contract. The evidence shows that, although the contract was dated November 17, 1924, it was not signed by the purchasers until four or five days later, andthat four

the purchase until four or five days later, neither from
ment was dated November 17, 1956, it was not signed by
signed the contract. The evidence shows that, although the
wish was paid even as evidence money at the time the purchase
1956 and the purchase price was $30,000.00, $1,000.00 of
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The record discloses that Tillie Rosen and Charles

in defendant's favor.

trial without a jury and there was a finding and judgment
was dismissed as to Charles Rosen, the case then went to
of defendant's property. On motion of plaintiff, the suit
be the him as real estate broker's commission for the sale
Plaintiff brought suit against Tillie Rosen and
Charles Rosen, her husband, to recover $900.00 claimed to

the merit.

MR. PATRICK O'DONNOR delivered the opinion of

Opinion filed Oct. 13, 1958.

Reversed in favor.
Plaintiff in Error.

TILLIE ROSEN,

vs.

CHARLES ROSEN,

Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

R. C. DEAN, trading as R. C. Dean & Co.,

2431 A. 606

78 - 2006

or five days after the purchaser signed the contract, plaintiff through his representative submitted it to the defendant and her husband for their signatures. The evidence further shows that Tillie Rosen signed her name and that of her husband to the contract, and it further appears that plaintiff's representative, Paul Brant, witnessed Charles Rosen's mark to the contract. The evidence is in dispute as to whether Charles Rosen made his mark on the contract as it appears on its face. Whether he was unable to read does not appear. Mrs. Rosen signed this contract on the 28th of November, 1924, and on the next day pursuant to a telephone conversation from her to plaintiff's representative, the representative took the contract back to Mrs. Rosen's home, as she said she wanted to look at it to see about the broker's commission referred to in the contract. The representative took the contract with him and exhibited it to Mrs. Rosen and her fifteen year old son and the latter proceeded to tear it up. The pieces of the contract were taken by plaintiff's representative, pasted together and he returned to plaintiff's place of business, called up plaintiff's lawyer and advised him as to what had taken place and the lawyer advised that the contract be recorded, which was done on the 1st of December following. On the 5th of December, the lawyer called on Mrs. Rosen and he testified that she absolutely refused to go through with the deal. Afterwards the plaintiff returned $1,000.00 earnest money to the purchasers. Before this was done, however, repeated demands were made upon her for the abstract so that the title could be examined. Mrs. Rosen denied that any such demand had been made upon her and denied that she refused to carry out the transaction, but was anxious and willing to do so,

carry out the transaction, but was anxious and willing to do so" deemed had been made upon her and denied that she refused to title could be executed. Mrs. Rosen denied that any such pected documents were made upon her for the signature so that the ready to the purchasers. Before this was done, however, re-the deal. Afterwards the plaintiff returned $1,000.00 received be testified that she eventually refused to go through with on the 8th of December, the lawyer called on Mrs. Rosen and be returned. which was done on the 1st of December following. to what had taken place and the lawyer advised that the contract pointee, called up plaintiff's lawyer and advised him as pected together and be returned to plaintiff's place of of the contract were taken by plaintiff's representative, old son and the latter proceeded to tear it up. The pieces with him and exhibited it to Mrs. Rosen and her fifteen year to in the contract. The representative that the contract to look at it to see about the broker's commission referred contract back to him. Rosen's home, so she said she might per to plaintiff's representative, the representative took the and on the next day returned to a telephone conversation from Mrs. Rosen signed this contract on the 28th of November, 1956, ite them. Whether he was unable to read does not appear. Charles Rosen made his mark on the contract as it appears - mark to the contract. The evidence is in dispute as to whether plaintiff's representative, Syd Bernt, witnessed Charles Rosen's pendent to the contract, and it further appears that plain-that above that TILLIE Rosen signed her name and that of her and her husband for their signatures. The evidence fur-still through his representative submitted it to the defend- or five days after the purchaser signed the contract, plain-

but that on account of her illness she advised plaintiff's representative that he would have to wait until she regained her strength and then she would go through with the deal. She further testified that she told the plaintiff not to return the $1,000.00 deposited because she desired to consummate the transaction. It is the contention of the defendant that the reason the deal fell through was on account of plaintiff returning the $1,000.00 to the purchaser and that he lost his commission by virtue of the fact that he consented to the cancellation of the contract by plaintiff. We have considered carefully all of the evidence in the record and are clearly of the opinion that the reason the deal was not consummated, wasoccasioned by the fact that the defendant refused to do so. This appears not only from the witnesses who testified on behalf of the plaintiff, but it also appears from defendant's own testimony and that of her son. Although she testified that she told plaintiff and his representative not to return the $1,000.00 and that she desired to consummate the deal, yet she also testifies on direct examination that on the morning after the contract was signed by herself, that she said to plaintiff's representative: "I just signed the contract and Mr. Rosen said he was not going to go through with the deal, I said he should wait until I got Mr. Rosen to go through with the deal;" that the representative replied that the deal would have to go through and that he would record the contract and tie up the property to which she replied, "Mr. Brant, you know the condition Mr. Rosen is in, I am so sick, why do you make me all the trouble." The testimony of the defendant further shows that plaintiff's representative was at her home endeavoring to secure her signature and that

of her husband to the contract and in response to questions put to her by the court as to why she signed the contract, she replied that Mr. Rosen was sick and that she told Mr. Brant (plaintiff's representative) "please Mr. Brant, leave me alone", I just have to do it; that Mr. Rosen got 'wild'", and that she had been ill herself, but that plaintiff's agent kept running from one room to another after them in the house until she wrote her name and that of her husband. Her testimony is further that plaintiff's salesman was at her home endeavoring to secure her signature, from eight o'clock in the evening until eleven o'clock at night. We think the evidence shows that the purchasers were willing to carry out the deal but that the defendant and her husband refused to do so, and the finding of the court to the contrary is against the manifest weight of the evidence, if not contrary to substantially all the evidence. The judgment must be reversed for this reason. Since there must be a re-trial of the case, although the point is not made, we think we ought to say that the plaintiff cannot recover on the statement of claim which is based upon the contract for the sale of the property signed by the parties. By the terms of that document neither the defendant nor her husband promised to pay any broker's commission to the plaintiff. If plaintiff was to receive from the defendants a commission of $500.00, it must be shown by some other agreement. The contract merely recites that the purchaser is to pay $1,000.00 earnest money and that the contract and the earnest money are to be held by plaintiff for the mutual benefit of the parties to the contract. It further provides that if the purchaser of the property should fail to carry out the contract, the $1,000.00 earnest money might be retained by the vendors at

their option as liquidated damages; that in case the earnest money was so retained, the broker should apply the money "first, to the payment of any expenses incurred for the vendor or by his agent in said matter and second, to the payment to vendor's brokers of a commission of $500.00 * * * on the selling price herein mentioned, for his services in procuring this contract, rendering the overplus to the vendor." From this it is obvious that the seller did not in the written contract agree to pay plaintiff anything. If there was an agreement between plaintiff and the defendant that he was to receive $500.00 or any other sum for his commission, it must be shown that there was some contract between them. The contract upon which plaintiff bases his action is between the defendant and the purchaser; plaintiff is not a party to it and there is no promise by the seller to pay him anything.

For the reason that the finding of the court is against the manifest weight of the evidence, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

174 - 30993

LEROY F. HARRIS,
Appellee,

v.

LEVY SMITH AND EUGENE F. MANNS,
Appellants.

243 I.A. 606
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of forcible detainer against the defendants to recover possession of certain premises in Chicago. Judgment was entered in favor of plaintiff on the 3rd of December, 1925. Afterwards, on motion of the defendants, the judgment was setaside and vacated and further evidence introduced and the court again found in favor of the plaintiff and against the defendants and entered judgment for possession and the defendants appeal.

The record is somewhat confused, but from a careful consideration of it, we think it appears from the evidence that on the 15th day of September, 1925, the defendant Manns, entered into a written lease for the premises in question with the owner thereof, the Shean Steel Window Co., whereby the premises were demised from the 15th of September, 1925 until April 30, 1929; that Manns went into possession of the premises and associated the defendant Levy Smith with him; that thereupon the defendants spent

Opinion Filed Oct. 13, 1886.

several hundred dollars in repairing the building so that it could be used for hotel purposes and they proceeded to conduct a hotel in the premises; that Manns upon the execution of the lease, September 15th, paid the landlord $600.00 as rent called for by the lease; that he borrowed this $600.00 from plaintiff; that four days after the execution of the lease, namely, on September 19, 1935, Manns executed a written assignment of the lease to plaintiff and this assignment was consented to by the landlord on the same date; that afterwards Manns paid Harris $150.00 on account of the $600.00; that on October 9, 1935, Manns paid to the landlord the November rent of $350.00 and on December 1st he also paid $350.00 for the December rent of the premises to the landlord. On October 29, 1935, plaintiff instituted the instant case against the defendants. Afterwards and while the suit was pending, the defendants filed a bill in the Superior Court of Cook County against the plaintiff Harris and the landlord, seeking to enjoin Harris from prosecuting the suit in the Municipal Court and praying that a decree be entered holding that the assignment of the lease by Manns to Harris was to secure Harris on account of the $600.00 loan he had made to Manns. The will was introduced in evidence by plaintiff on the trial of the instant case. The introduction of the verified bill by plaintiff was without any limitation and substantially all of the foregoing facts are set up in the bill.

The defendants contend that the judgment is wrong and should be reversed because plaintiff made no demand for possession of the premises before bringing the forcible detainer suit and it is contended that such notice is required

by the provisions of secs. 6 and 8 of Chap. 80 of the Revised Statutes of Illinois. In reply to this contention plaintiff states that no notice is required because it appears that the defendants wrongfully went into possession of the premises and that in such case no demand is necessary. We think neither of the contentions can be sustained. The defendants' contention is wrong because the statute referred to applies to the relation of landlord and tenant which relation did not exist between these parties. The plaintiff's contention is wrong because the evidence shows that Manns went into possession of the premises under the written lease which he had a right to do. But plaintiff contends that the judgment is right and should be affirmed because, as his counsel states, "The admissions of defendants in the bill in chancery filed by them to enjoin the forcible detainer action were admissible, and are complete evidence of their wrongful possession." We think counsel's conclusion is erroneous. The bill sets up facts tending to show that the assignment of the lease was made to plaintiff as security for the $600.00 loan, which he had made to the defendant, Manns and that they could not make such defense in the forcible detainer action, but must resort to a court of equity. But plaintiff did not rest when he introduced the lease showing it had been assigned to him, but put in all of the defenses that were contended for by the defendants in their bill. And plaintiff by his proof having shown that the assignment of the lease was in fact made as security for the $600.00 indebtedness, he is estopped from now contending that he is entitled to possession of the premises by virtue of the

assignment of the lease.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

413 - 30676

NORTHWESTERN EXPENDED METAL COMPANY, a corp.,

Appellee,

v.

JUDSON FREIGHT FORWARDING COMPANY, a corporation,

Appellant.

243 I.A. 607

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The Northwestern Expanded Metal Company, filed its bill praying for discovery and an accounting by the defendant, Judson Freight Forwarding Company. Complainant was a manufacturer of metal lath products which it exported in large quantities to customers located abroad. In connection with that business, complainant alleged in its bill of complaint, it became necessary to employ the services of a forwarding company to arrange and supervise its freight shipments. The defendant was engaged in that business and complainant alleged that in January, 1915, it entered into a written agreement with the defendant, whereby it employed the latter as agent for the handling and supervising of all its export shipments, by the terms of which defendant undertook, on complainant's behalf, to arrange for freight space on the vessels of steamship lines at the lowest possible rates, to secure insurance on such shipments; to arrange terminal and storage facilities for the shipments, and perform all services required in forwarding the shipments from the

2131.A. 607

ALTMAN, Appellee,

v.

ORANGE COUNTY,

Appellant.

Opinion Filed Oct. 13, 1906.

MR. JUSTICE THOMSON delivered the opinion of the court.

ports of export, and that the compensation agreed upon for this service during the year 1915 was $3.00 per car on all carload shipments and $1.35 on less than carload shipments. Complainant also alleged that by said contract it was agreed that complainant would reimburse defendant for all moneys expended by defendant for complainant's account. A number of complainant's shipments to foreign customers were handled by defendant under this contract during 1915. Defendant continued to act as forwarding agent for the complainant in the following years and down to February, 1919, and complainant alleged in its bill that many of its shipments were handled by defendant during that period and that defendant became entitled to collect from complainant for its services thus rendered as forwarding agent, a reasonable handling charge, which complainant alleged to be not in excess of $3.00 per ton for each shipment. This, it will be noted was on a different basis from the compensation agreed upon for 1915 in the written agreement, entered into by the parties in January of that year. Complainant further alleged that after February 1915, by express agreement, the compensation was fixed at $5.00 per ton for a certain period and $2.00 per ton for another period.

Complainant further alleged in its bill that it had reposed entire confidence in the good faith and honesty of the defendant during theentire period of its employment by the complainant and that by reason of the relationship of principal and agent existing between them, it was the defendant's duty to exercise the highest degree of loyalty and honesty toward complainant and to fully disclose the amounts

person of anyone, and that the compensation agreed upon for this service during the year 1918 was $2.00 per ear in all cases shipments and $1.25 on less than carload shipments. Complainant also alleged that by said contract it was agreed that complainant would reimburse defendant for all moneys expended by defendant for complainant's account. A number of complainant's shipments to foreign countries were handled by defendant under this contract during 1918. Defendant continued to act as forwarding agent for the complainant in the following years and down to February, 1919, and complainant alleged in its bill that many of its shipments were handled by defendant during that period and that defendant became entitled to collect from complainant for its services thus rendered as forwarding agent, a reasonable handling charge, which complainant alleged to be not in excess of $2.00 per ton for each shipment. This, it will be noted was on a different line from the compensation agreed upon for 1918 in the written agreement, entered into by the parties in January of that year. Complainant further alleged that after February 1919, by express agreement, the compensation was fixed at $2.00 per ton for a certain period and $3.00 per ton for another period.

Complainant further alleged in its bill that it had removed entire machines in the good faith and honesty of the defendant during the period of its employment by the complainant and that by reason of the notwithstanding of friendly and equal existing between them, it was the defendant's duty to exercise the highest degree of loyalty and honesty towards complainant and to fully disclose the amounts

actually expended by it for complainant's account, but that defendant, throughout the entire period of its employment, in disregard of its said duty, submitted false statements and reports of moneys alleged to have been expended for complainant's account, for freight, insurance and terminal facilities; that complainant had no means of ascertaining the truth or falsity of defendant's accounts and reports and that it paid the amounts called for by all statements submitted. It was further alleged that by means of said false and fraudulent practices by defendant, it had procured payments from complainant in excess of the amounts to which it was entitled, to the extent of over $15,000 and that, upon discovery of defendant's alleged fraud, the complainant demanded an accounting, which was refused; that all contracts, vouchers and books of account, showing the amounts actually expended by defendant for complainant's account were in the defendant's possession and it refused t permit complainant to have excess thereto.

By its answer, the defendant admitted the arrangement which had been entered into between the parties by written agreement, for the year 1915, and alleged that in December of that year, a new agreement was entered into under which defendant was to "submit rates for complainant's approval and acceptance, and that complainant should either accept or reject the rates submitted;" that this new arrangement continued until February, 1919, when another contract was entered into by the parties as set forth in the bill of complaint, which latter agreement was in operation until the parties ceased their business relations. The answer denied all fraud on defendant's part and denied that complainant was entitled to any relief.

relief.

ant's part and denied that complainant was entitled to any punitive reparations. The answer denied all fraud or defendant's further allegation that in connection with transactions by defendant, it had breached duties from complainant to defendant, and that complainant was estopped from complaining of defendant's actions and failure to mitigate damages. In its answer, the defendant admitted the existence of the account in which it was entitled, in the amount of $18,000 and that, upon discovery of defendant's error in excess of the amounts to which it was entitled, in the aggregate the amounts actually expended by defendant for complainant's benefit; that all contracts, vouchers and books of account were returned; the complainant demanded an accounting which refused them; the complainant demanded an accounting which refused them; that complainant was estopped by defendant's failure to mitigate damages; and that complainant's actions, but that complainant's actions, but that complainant's actions, but

The case, on the issues thus formed, was referred to a master for the purpose of determining whether complainant was entitled to an accounting. The master found that the difference between the amounts actually paid out by the defendant for complainant's account to steamship lines, insurance companies and others, and the amounts paid by the complainant to the defendant to cover those charges pursuant to the statements rendered by the latter from time to time, was upwards of $7,000.00 and that the defendant would be required to account, as complainant's agent, for all moneys received over and above the sums which it was entitled to collect, but that complainant had failed to establish the existence of any contract for compensation or the terms of such compensation, applicable to the years 1916, 1917 and 1918, and inasmuch as the burden of establishing the terms of such contract was on the complainant, its bill should be dismissed.

Exceptions which were filed by complainant to that report of the master, were sustained by the chancellor, who found that the allegations of complainant's bill had been proven. The chancellor also found that as no rate of compensation had been agreed upon by the parties covering the years of 1916, 1917 and 1918, although the complainant continued to employ the defendant as its forwarding agent during those years and after the contract of 1915 had ceased to have effect, the defendant was only entitled to receive a reasonable sum as its compensation for the services rendered; that during those years the defendant had performed services as forwarding agent for complainant without disclosing to the latter, the sums actually paid out for the facilities contracted for;

that complainant, during that period, was unable to ascertain from sources other than defendant, what were the sums actually paid out by the defendant for complainant's account; that the confidential relationship of principal and agent existed between the parties, calling for the exercise of good faith on defendant's part as such agent but that defendant disregarded such duty and failed to submit correct statements of account but did submit false statements which incorrectly stated the amounts which had been paid out for complainant's account, and that therefore complainant was entitled to an accounting and that upon said accounting, the defendant was entitled to charge against the account, all sums actually paid out by it in complainant's behalf, together with a reasonable handling charge for the services rendered by the defendant. The case was again referred to a master for the purpose of determining what a reasonable handling charge was and for the purpose of stating an account between the parties.

Further testimony was then taken as to what constituted a reasonable handling charge under all the circumstances surrounding the shipments involved and an account was stated and the master reported that complainant was entitled to have defendant pay back to it, the sum of $8,491.01. That report of the master was approved and the court entered a decree in complainant's favor for the amount found due it by the master, together with interest and costs, amounting in all to $9,887.97. To reverse that decree, the defendant has perfected this appeal.

All the sales by the complainant to its foreign customers were on terms referred to in the record as F.A.S. -

that is, "free at ship's side." The defendant, acting as forwarding agent, negotiated contracts for freight space on steamers, placed insurance on the shipments, and delivered the bills of lading, export documents and insurance certificates to the complainant, the consignor of the shipments. Defendant paid the freight charges, insurance premiums, warehouse charges and all other expenses connected with the shipments and billed complainant for the amounts so paid, together with a charge for its services.

Apparently, in many cases the charge made by defendant for its services was "absorbed" by it, into the ocean freight charges. The testimony shows that on several occasions, representatives of the complainant complained to the defendant that the bills they were submitting were too high or were excessive. The charge especially referred to was the "ocean charge". The reply made by the defendant's representative was that the charges "were the same that were billed by the steamship company, plus their handling charge," which he said, "was a reasonable sum, not to exceed $5 per ton." The record shows that the ocean carrying business was highly competitive and there were no published tariffs and the rates were constantly changing, according to the state of the demand for space and its availability. The defendant contracted for the space for complainant's shipments in defendant's own name and paid the freight bills and then itself billed complainant for the amount it had paid, plus its charge for handling the shipment.

shipment.

for the amount it has paid, plus its charge for handling the and paid the freight bills and/or transit billed complaints the open for complainant's shipments in defendant's car mile for shipments. The defendant contended for ware commodity shipments according to the scale of the Sunset competitive and third zone to published tariffs and the rates the record shows that the cases originating points are said, "was a reasonable sum, and to exceed $2 per car," by the commodity company, plus their handling charge," which tive was that the charges "were the same that were billed "based charge". The reply made by the defendant's represen- or were excessive. The charge specifically referred to was the defendant that the bills they were submitting were too high tions, representatives of the complainant complained to the freight charge. The testimony shows that on several occa- Apparently, in many cases the charge made by defend- ant for its services was "absorbed" by it, into the common points charge and all other expenses connected with the ship- ments and billed complainant for the amounts so paid, be- fore with a charge for its services.

Before said the freight charge, insurance premium, mate- rials on the complainant, the weights of the shipments, the bills of lading, export documents and insurance certifi- cates, placed insurance on the shipments, and delivered that is, "like an auto's ride." The defendant, acting as for-

Counsel for defendant say in their brief that "the great issue involved in this litigation is, what was the reasonable cost of compensation for forwarding companies" during the years in controversy? That is hardly the only issue presented. The record shows clearly that in a number of instances, the defendant billed the complainant for amounts it alleged it had actually paid out for complainant's account for insurance charges or freight charges which were materially greater than the amounts which the defendant had in fact paid out for those charges.

Coming to the question of what was a reasonable charge for the services rendered by forwarding companies during the period in question, this was the subject of conflicting testimony submitted by the respective parties. Complainant presented six witnesses on this question. Two of the witnesses, both officers of the complainant company, testified that a reasonable charge for the services rendered by the defendant during the period in question was $1 to $2 per ton. Another witness said that where the shipments were small, a reasonable charge was $1.50 to $5.00 per shipment and that on iron and steel articles, a customary and reasonable charge was from fifty cents to $3.00 per ton. Another of complainant's witnesses said the usual charge paid to forwarders by his company, during this period, was $2.00 to $2.50 per ton. His company was an importer and exporter of iron and steel products. Another put the reasonable charge at not to exceed from $2.00 to $10.00 per shipment. This witness was the export and import agent for the International Harvester Company. He was also a teacher of the subject of

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exports in the National Institute of Traffic and Trade, and an author who had written on thesubject of export shipment. He went into the reasons for basing his figures on shipments rather than tonnage. He explained that "during the period 1916 to 1919, there was extra labor but that [illegible] was more than compensated for by the forwarder's greater profit on the much higher ocean freight rates - the brokerage; the average freight rate was several times as high at that time * * *" Another witness who had been engaged in the freight forwarding business for some years, put the reasonable charge for forwarders at this period, at from $1.50 to $7.00 per shipment on small shipments and from 25 cents to 50 cents per ton on large shipments.

The defendant presented five witnesses on this question. All of them were engaged in the freight forwarding business. They all answered a hypothetical question purporting to give the nature of the services rendered by the hypothetical forwarder, whose reasonable compensation they were asked to state. They stated the reasonable charge for the services assumed in the hypothetical question would be from $10 to $25 per ton. The question asked each of these witnesses included as one of its assumptions, that the forwarder "assumed the risk of filling contracts entered into with the steamship lines." We have not been referred to any evidence in the record which is claimed to show or tend to show that the defendant assumed any such risk in connection with the service it rendered the complainant. One of defendant's witnesses stated that in making his answer to the hypo-

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thetical question, he considered the element of risk at greater than fifty per cent of the basis for the forwarder's charge. It is quite apparent from the testimony in the record that the defendant's witnesses on this question based their answers on a number of elements which the record fails to show were involved in the service which the defendant rendered the complainant. One of the witnesses who put the reasonable charge of a forwarding agent between $10 and $25 per ton, was asked what that range would depend upon, and he said it would depend upon the risk of handling the shipment which was involved. He added that "When you take a man's shipment, you give him a clear receipt for it and naturally he expects a clear delivery order. There was a tremendous amount of hazard along the routes through which the ships passed for which the shipper usually holds the forwarding agent responsible, and we found that a very big risk." He said his statement as to a reasonable charge would be different if that risk were eliminated. As pointed out by counsel for complainant, it does not appear from any of the evidence in this record, that any such risk was involved here. It does not appear that defendant gave complainant "clear receipts", for shipments it handled. So far as this record shows, whatever liability might have arisen in case of the loss or damage to goods in transit, would have arisen under the bills of lading. Nothing appears in any of the bills of lading contained in the record, tending to show that the shipments were at the forwarder's risk. Presumably the carriers were responsible for the safe carriage of the shipments.

The master recommended and the chancellor allowed,

in entering the decree appealed from, as a reasonable handling charge for defendant, $2 per ton with a minimum of $5.00 per shipment. It is urged that a reasonable charge for this service during the years involved, should be much higher, (because of the then war conditions) than it was in 1915, when the parties by contract, fixed it at $2.00 per car on carload shipments, and $1.25 on less than carload shipments. When we take into consideration the fact that a car of metal lath consists of between 30 and 40 tons, as the record shows, it is quite apparent that the charge of $2.00 per ton, fixed by the court, was, in fact, 30 to 40 times the compensation fixed by the parties by agreement for the year 1915. Counsel for the defendant also make the point that in 1919, an agreement was entered into by the parties, as to some shipments, by which the defendant was paid at the rate of $5.00 per ton for its services. Such a rate is referred to in a letter from defendant to complainant dated February 26, 1919. It apparently obtained for only a brief period for it appears from another letter, from defendant to complainant, dated April 16, 1919, that defendant then agreed to handle complainant's export shipments ata rate of $2.00 per ton. How many shipments were made under the rate referred to in the February letter, or what the circumstances surrdunding them were, is not shown. We cannot say from the record that the trial court was not warranted in finding that a reasonable charge for defendant's services during the years of 1916, 1917 and 1918, was $2.00 per ton, with a minimum of $5.00 per shipment. It is contended such finding is not supported by a preponderance of theevidence. There is evidence

in the record supporting the finding. The fact that there is other evidence which is to the contrary would not warrant this court in disturbing the finding, unless we were of the opinion that, on the whole, the decree was against the manifest weight of the evidence. That we cannot say.

The defendant contends further that there was no privity of contract between it and the complainant,- that in the case of each shipment complainant's customer was disclosed to the defendant and that, in arranging for the forwarding of the shipment, the latter was not acting for complainant but rather for complainant's customer, - that, therefore, the customer was the principal, the complainant was the agent and the defendant was the sub-agent in the transaction. In our opinion that contention is wholly untenable. In the correspondence which passed between the parties in 1915, which constituted the contract the parties originally entered into, the defendant wrote the complainant saying, "We are willing to handle your export business * * * on the following basis." The complainant replied, saying: "Your porposition to take care of all of our export shipments * * * is quite satisfactory to us and we trust we may be able to give you some good business in the next year."

The record shows that whenever the complainant received an order for goods which involved a foreign shipment, it notified defendant thereof, giving the destination of the goods and the amount of the shipment. The defendant would then notify complainant as to the amount of the charges involved, including freight and insurance and the complainant

would include these amounts in the amount of the draft it would draw on its consignee. Under the terms of complainant's sales to its customers, it prepaid these shipping and carrying charges and was then reimbursed for their amounts, through the draft which accompanied the bill of lading.

It has been held in many cases that a shipper, even though he has delivered the goods involved to the carrier, and thus parted with the title, nevertheless has such a special interest in the goods that he may sue the carrier on the contract of transportation in his own name, the recovery of the shipper in such case being for the benefit of the consignee. Illinois Central Ry. Co. v. Schwartz, 13 Ill. App. 490; Great Western R. R. Co. v. McComas, 33 Ill. 185; Northern Line Packet Co. v. Shearer, 61 Ill. 263; Edgerton v. C.R.I.& P. Ry. Co., 240 Ill. 311. In Hooper v. C.& N. W. Ry. Co., 27 Wis. 81, the court pointed out that it does not lie with the carrier, who has made a contract with a shipper, to say upon a breach of it, that the latter is not entitled to recover the damages, for it will be presumed, unless it be shown that the consignee objects to the action, that it was commenced, and is being prosecuted, with the consent of the consignee and for his benefit. The court then said "The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal."

In a similar case, Carter v. Southern Railway Co., 36 S. E. 306, the court said that "the privity of contract

between the carrier and the consignor is a sufficient foundation on which to base the action * * * the recovery inures to the benefit of the owner, and the consignor is regarded simply as the trustee of an express trust."

In our opinion, the principle announced in these cases, involving a consignor and a carrier, is entirely applicable to the case of a consignor and a forwarding agent. We are further of the opinion that it is quite immaterial that complainant has been reimbursed by its customers in the amounts representing all the overcharges which complainant here seeks to have the defendant pay back to it. The defendant may not concern itself with what may be the proper subject of an accounting between the complainant and its customers. Meinshausen v. American Shipping Co., 197 Ill. App. 620. In another carrier case, the principle of which we consider applicable here, the carrier, upon being sued for the recovery of alleged excess charges resisted the payment of them on the ground that the consignor plaintiff had collected the amounts of such charges from its customers. The court held the carrier's position untenable and said, in the course of its opinion; "The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law, and it does not inquire into later events. * * * The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum." Southern Pacific R. R. Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531.

In our opinion, the chancellor did not err in holding that there was such privity of contract between

between the carrier and the consignor in a sufficient transaction on which to base the action " " the recovery inures to the benefit of the owner, and the consignor is regarded simply as the trustee of an express trust."

In our opinion, the principle announced in these cases, involving a consignor and a carrier, is entirely analogous to the case of a consignor and a forwarding agent. We are further of the opinion that it is quite immaterial that complainant has been reimbursed by its customers in the amounts representing all the overcharges which complainant may not recover itself as it may be the proper subject of an agreement between the complainant and its customers. Interstate v. Western Oil Refining Co., 194 Ill. App. 580. In another carrier case, the principle of which we consider applicable here, the carrier, whom being sued for the recovery of alleged excess charges resisted the payment of them on the ground that the consignment plaintiff had collected the amounts of such charges from its customers. The court held the carrier's position untenable and said, in the course of its opinion "The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim occurred at once in the theory of the law, and it does not require into later cavern. " " The carrier ought not to be allowed to retain the illegal profit, and the only one who can take it from him is the one that stood ree in relation with him, and from whom the carrier took the sum." Montgomery Traffic R. Co. v. Darnell-Taenzer Lumber Co., 248 U. S. 521.

complainant and defendant as to give the complainant a right of action and that the relationship between the parties was such as to require the defendant to account to the complainant as provided by the decree.

For the reasons stated, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

474 - 30738

CHARLES W. VLACH,
Appellee,

v.

HENRY W. BOWMAN and
ELLEN M. BOWMAN,
Appellants.

243 I.A. 607

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Vlach, a real estate broker, brought this action in the Municipal Court of Chicago against the defendants Henry W. Bowman and wife, seeking to recover a commission alleged to be due him for services rendered in procuring a purchaser who was ready, willing and able to buy certain property they had listed for sale with him on the terms which the owners had specified or agreed upon. The issues presented were submitted to a jury, resulting in a verdict for the plaintiff and an assessment of his damages at the sum of $1047.50. Judgment for the plaintiff was entered on that verdict, from which the defendants have perfected this appeal.

It appears from the record that the defendants were constructing a building containing a store and five apartments, and during the course of construction they listed the property at the office of the plaintiff for sale at a minimum price of $37,000, with a cash payment of at least $5,000, the buyer to assume a first mortgage of $25,000 and secure deferred payments of $1,000 in 2½ years; $1,500 in

CHARLES K. VLACH,
Appellee.

vs.

ERNEST E. NORMAN and
ELLEN E. NORMAN,
Appellants.

APPEAL FROM
SUPERIOR COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Vlach, a real estate broker, brought this action in the Municipal Court of Chicago against the defendants Ernest E. Norman and wife, seeking to recover a commission alleged to be due him for services rendered in procuring a purchaser who was ready, willing and able to buy certain property they had listed for sale with him on the terms which the owners had specified or agreed upon. The issues presented were submitted to a jury, resulting in a verdict for the plaintiff and an assessment of his damages at the sum of $1067.50. Judgment for the plaintiff was entered on the verdict, from which the defendants have perfected this appeal.

It appears from the record that the defendants were constructing a building containing a store and five apartments, and during the course of construction they listed the property at the office of the plaintiff for sale at a minimum price of $27,000, with a cash payment of at least $5,000, the buyer to assume a first mortgage of $15,000 and assume deferred payments of $1,000 in 2½ years; $1,000 in

3 years, and $1,500 in 4 years. The testimony submitted in behalf of the plaintiff was to the effect that shortly after this property was listed in his office it was shown to one Cohn, and he wanted certain things done or stipulated for, before he would be interested in purchasing the property. The plaintiff's representative made out a list of these things, and in a few days saw the defendant and went over the list with him, and plaintiff's representative testified that he agreed to all the items on the list except one calling for covering the pipes in the basement, and when it was represented that this would cost about $135.00 and that plaintiff would stand half of that expense, the defendant agreed to it. Plaintiff's representative also testified that on this occasion the defendant was told that the buyer had a lot which he wanted to trade in on the deal on a basis of $4500, and that the defendant said he would look at the lot, and that later, upon another talk with the defendant the latter stated that $4,500 was too much for the lot and that he would not agree to take it on this deal on a basis of more than $4,000. On the occasion of the latter conversation, plaintiff's representative testified, the defendant was told that there was a mortgage of $1,175 against the lot and on this basis the defendant directed that the contract for the sale of his property be prepared. This was done and Cohn signed the contract. Plaintiff's representative testified that thereafter the defendant and his wife came to the plaintiff's office and stated that he wanted to take the contract home with him and examine it and have his lawyer look it over before he signed it. This was done and the defendant made several appointments which he did not keep, and finally when the plaintiff and his repre-

sentative went to see the defendant, their testimony is to the effect that the defendant complained about one item mentioned in the contract, which was, carpet on the stairs of the building, which was an item he claimed he had not agreed to. It was their contention that he had. Their testimony is further to the effect that he also complained that the contract did not call for enough cash, and his attention was called to the fact that he had stipulated for a cash payment of $5,000, and the contract called for a cash payment of $4,000 in addition to $1,000 which had already been deposited as earnest money. Their testimony is further to the effect that the defendant said he didn't think his wife wanted to sell. These were all the reasons advanced for the defendant's refusal to sign the contract which the purchaser had executed, according to the testimony of the plaintiff and his representative. Some of this testimony was denied by the defendant, but in our view of the case it will not be necessary to go into detail as to that.

A real estate broker who is employed by a property owner to find a purchaser for his property, has earned his commission when he procures such a purchaser, who is ready, willing and able to buy theowners property on the terms which the latter has stipulated or agreed to. To entitle such a broker to his commission, where he is employed to procure a purchaser, it is not necessary in order that he be entitled to his commission, that he procure the execution of a contract which is specifically enforceable between the seller and the buyer, unless those terms have been stipulated in the employment of the broker. Fox v. Starr, 106 Ill. App. 273; Rushkewicz v. St.

George, 226 Ill. App. 310. In order, however, that the broker may be entitled to a commission for his services in producing a buyer, the latter must not only be ready, willing and able to buy the property, but he must be ready and willing to buy it at t terms which the seller has stipulated or to which he may have agreed. It is the position of the defendants in the case at bar that the evidence submitted in behalf of the plaintiff showed tha he had failed in that regard because the contract which the buyer had signed contained a number of conditions which had not been stipulated by the defendants and to which they had never agreed.

The contract which the buyer, procured by the plaintiff, had signed was introduced in evidence and it contained a stipula- tion to the effect that the seller agreed to furnish a number of items. These items included all those mentioned in the list which the plaintiff's representative testified was made up to me the views of the purchaser and was later shown to the defendant and agredd to by him, but it also contained a number of other items which did not appear on that list. These items consistedo: "cement sidewalks on both sides of building, * * * screens, screen doors * * * up-to-date electric fixtures * * * remove all rubbish and level off yards," and also an item to the effect that "it is agreed that the deal will not be closed until after building is finished." In meeting that position of the defend- ants the plaintiff contends that they are precluded from defend- ing on that ground because they did not specify any such objec- tions when they refused to enter into the contract which the buyer had signed and which was tendered to them. In our opinion, that position of the plaintiff is not well taken and the cases relied upon by him are not in point.

Among the cases so relied upon by the plaintiff are Johnson v. Stewart & Hay Building Co., 171 Mo. App. 543; Braniff v. Baier, 101 Kans. 117; Weaver v. Snow, 60 Ill. App. 634; Smith, Executrix v. Keeler, 51 Ill. App. 267; 151 Ill. 518. In the Johnson case, it appears that the broker was suing the property owner for commissions earned in producing a buyer who was ready, willing and able to take the property and who had executed a contract to buy, and that the seller who was the broker's principal, suggested certain changes in the terms and all these suggestions were fully met by the buyer, who executed a new contract incorporating all these suggestions, and then the seller merely stated that he had "concluded to let the deal drop." In the Braniff case the court pointed out that the broker had procured a purchaser who had agreed to buy the seller's property on terms which were "a substantial compliance" with the terms offered by the seller, there being a slight difference which was one of the mere details of the transaction * * * which the plaintiffs could easily have met at the time if the defendants had based their refusal upon that." In that case the sellers refused to go ahead with the sale, giving as their reason that "they had taken the land off the market and that it was not for sale." It would appear from the very brief opinion of this court in the Weaver case that after the broker procured a purchaser who was ready, able and willing to buy the property, the seller refused to carry out the transaction, not because any of the terms were unsatisfactory, but, as the court put it, he "refused absolutely to sell." In the Smith case the seller listed his property with the broker for sale at a price of $100 per front foot, "payable partly in cash and partly on time," but in what proportion

among the means so relied upon by the plaintiff?

are Johnson v. Lamont & Bay Building Co., 142 Mo. App. 668; Brandt v. Meier, 168 Mass. 118; Hanson v. Sandy, 80 Ill. App. 648; Smith, Trenwith v. Fowler, 81 Ill. App. 667; 182 Ill. 318. In the Johnson case, it appears that the broker was suing the property owner for commissions earned in procuring a buyer who was ready, willing and able to take the property and who had executed a contract to buy, and that the seller who was the broker's principal, suggested certain changes in the terms and all these suggestions were fully met by the buyer, who executed a new contract incorporating all these suggestions, and then the seller merely stated that he had "concluded to let the deal drop." In the Brandt case the court pointed out that the broker had procured a purchaser who had agreed to buy the seller's property on terms which were "substantially compliance" with the terms offered by the seller, there being a slight difference which was one of the mere details of the transaction " " which the plaintiffs could easily have met at the time if the defendants had based their refusal upon that." It was thus the seller's refusal to go ahead with the sale, giving as their reason that "they had taken the land off the market and that it was not for sale," It would appear from the very brief opinion of this court in the Fowler case that after the broker procured a purchaser who was ready, willing and able to buy the property, the seller refused to carry out the transaction, not because any of the terms were unsatisfactory, but, as the court put it, he "refused absolutely to sell." If the Smith case the seller listed his property with the broker for sale at a price of $100 per front foot, "payable in cash and partly on time," but in what proportion

partly

did not appear, the broker to have everything over $100 per foot as a commission. He procured a purchaser at a little over $100 a front foot and when he advised the seller to that effect the latter stated that after he had last seen the broker he had received an offer of $125 a foot, "and I guess I better keep it." The court held that the broker hadprocured a purchaser upon terms which were within the purview of his authority and he was therefore entitled to his commission. We are of the opinion that these cases may readily be distinguished on the facts from the situation presented in the case at bar.

In Jepsen v. Marohn, 22 S.D. 593, a broker was authorized to find a purchaser of an owner's property on a basis of $4,200, payable $2,200 down and $1,000 in one year, and $1,000 in two years, with interest at 10 per cent. He found a buyer, ready, willing and able to take the property at $4,200, all cash, which was refused by the owner, one reason given being to the effect that "it wasn't enough." In a suit against the owner by the broker for the commission, he claimed he was entitled to, the court held that no question of estoppel was involved but that the only question was as to whether or not the broker had procured a purchaser, ready, willing and able to buy the owner's property on the terms which the latter had stipulated. The court held that it was clear that he had not done so "but sought to substitute an entirely different contract from that he was authorized to make, which latter was not accepted by the defendants," and the court held that under the circumstances the owners were not liable to the broker for a commission. In Stearns v. Jennings, 128 Wis. 379, it appeared that the owners of a number of lots listed them with a broker for sale at variou

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did not appear, the broker is here claiming even $100 per

prices, by a memorandum in writing containing a stipulation reading: "The lots to be sold only in the order they are enumerated above." The broker procured a buyer for certain of the lots out of the order which was enumerated in the memorandum referred to, and the defendant refused to accept the offer of purchase, but such refusal was not based upon the fact that the lots preceding the ones involved, as listed, remained unsold. The court held that the latter fact did not affect the right of the owners to resist payment of the broker's commission on that ground, saying: "Such failure of the defendant to reject such offer on that ground did not give the plaintiffs a right of action under the contract in violation of the express terms of the contract." In Rand v. Cronkrite, 64 Ill. App. 208, the stock and business of a corporation had been placed with certain brokers for sale upon stipulated terms. That broker produced a purchaser who offered to purchase on terms which differed materially from those which had been stipulated by the owners of the corporation. The latter refused to accept the offer of purchase, but did not place their refusal on the ground that the offer was not in accordance with the terms which had been given the brokers. The brokers sought to recover compensation, which they claimed was due them for their services, and in that connection urged that the owners having placed their refusal upon the ground that the time for making the sale had expired "cannot now object that they had never authorized a sale upon the terms proposed." The court held that the contention was not tenable, as the brokers had failed to procure a purchaser of the stock and business of the corporation on the terms stipulated by the owners but that the buyer they procured had offered

to purchase on terms which differed materially from those stipulated. In this connection the court said: "The principal invoked by appellees applies only to defects in form, matters of detail, objections which a party could easily have, and it is to be presumed would have, removed had they been objected to, so that an after insistence upon them is an injustice, they not being of the substance of the contract."

In Sattler v. Oliver, 138 Ill. App. 210, certain real property was listed by the defendant owner with the plaintiff broker for sale on certain terms which were specified at the time. The broker procured a buyer to sign a contract which contract was also signed by the broker as agent for the owner. The terms of purchase specified in the contract differed in several respects from the terms which had been stipulated. When the owner learned of the contract he repudiated it on the ground that it differed materially from the contract of sale he had authorized the broker to make for him, but it does not appear that he specified those differences in detail. It was held that he was not liable to pay the broker a commission. This case was affirmed in 233 Ill. 536.

In the case at bar the contract which was procured by the plaintiff broker differed in several material respects from the conditions to which the defendant owners had agreed even on the theory advanced by the testimony submitted in behalf of the plaintiff. It is not shown by that testimony that the defendants had ever agreed to supply cement sidewalks on both sides of their building, or screens, or screen doors, or "up-to-date fixtures", nor had they agreed to remove all rubbish andlevel off the ground surrounding the building; nor had they agreed to a sale which would not be closed until the

to purposes or terms which differed materially from those stipulated. In this connection the court said: "The parties involved by appellees apply only to defects in form, matters of detail, objections which a party could easily have and it is to be presumed would have, removed had they been objected to, so that an utter insistence upon them is an injustice, they not being of the substance of the contract."

In Bentley v. Oliver, 138 Ill. App. 210, certain real property was listed by the defendant owner with the plaintiff broker for sale on certain terms which were specified at the time. The broker procured a buyer to sign a contract which contract was also signed by the broker as agent for the owner. The terms of purchase specified in the contract differed in several respects from the terms which had been stipulated. When the owner learned of the contract he repudiated it on the ground that it differed materially from the contract of sale be had authorized the broker to make for him, but it does not appear that he specified those differences in detail. It was held that he was not liable to pay the broker a commission. This case was affirmed in 238 Ill. 288.

In the case at bar the contract which was procured by the plaintiff broker differed in several material respects from the condition to which the defendant owners had agreed even on the theory advanced by the testimony submitted in behalf of the plaintiff. It is not shown by that testimony that the defendants had ever agreed to supply cement sidewalks on both sides of their building, or screens, or screen doors, or "up-to-date fixtures", nor had they agreed to remove all rubbish and level off the ground surrounding the building and had they agreed to a main which would not be closed until the

building was finished. It does not appear from the testimony submitted in behalf of the plaintiff that these matters had even been mentioned by the defendants or to them, let alone agreed to by them. That being the case, the contract executed by the buyer procured by the broker appears on its face to stipulate conditions which were material and substantial and to which, according to the plaintiff's own proof the defendants had not agreed. Such being the situation we are of the opinion the plaintiff failed to make out a case showing that he was entitled to receive a commission from the defendants. We are, therefore, of the opinion that the verdict and judgment appealed from are against the manifest weight of the evidence.

For the reasons given the judgment of the Municipal Court of Chicago is reversed and the cause is remanded to that court.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

488 - 30750

ADVANCE WINDOW FRAME CO.,
Appellee,

v.

JENS K. DOE,
Appellant.

243 I.A. 607

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff company brought this action of the first class in the Municipal Court of Chicago, to recover from the defendant, who was a surveyor, damages alleged to have been caused to the plaintiff when it had proceeded to erect a building on property it owned, based upon a survey thereof by the defendant, which survey proved to be inaccurate, in that it located the north line of the property sixteen and a half feet north of its true location. The issues were submitted to a jury resulting in a verdict for the plaintiff, fixing its damages at the sum of $900. Judgment for the plaintiff being entered for that amount, the defendant has perfected this appeal therefrom.

Shortly after the first witness called by the plaintiff began his testimony, counsel for the defendant admitted in open court that his client had "made a mistake,- now the only question is the damages." In support of defendant's appeal counsel now seeks to urge several matters which do not have to do with the damages. This he may not do. Moreover, the points urged are without merit. It is said

Opinion filed Oct. 13, 1880.

there was a variance between the plaintiff's statement of claim and the evidence submitted in support of it. No such point was raised on the trial and in our opinion it could not have been raised successfully for all the evidence submitted was within the issues made by the pleadings. It is also urged that the defendant was held to be a guarantor of the correctness of his survey. The instructions of the court were not based on that theory but were rather to the effect that the defendant's liability was to be based on such negligence as he may have been guilty of. But in the course of the trial, as already pointed out, defendant's counsel took the position that his client had made a "mistake" in his survey, and that the only question of fact for the jury had to do with the damages suffered by the plaintiff as a result of the mistake.

The defendant contends that the damages awarded are excessive. The proof shows that the plaintiff's contractor proceeded on the basis of the defendant's incorrect survey. The trenches for all four walls were dug, the footings were in, some concrete had been poured for the walls, and certain forms were in place for further pouring, about twenty piers were in and the excavation for the boiler room had been made. The entire north and south walls had to be relocated, new trenches dug and the old, back filled; certain of the piers already in when the mistake was discovered, could be used but about twelve new ones were necessary; and the boiler room excavation had to be relocated. The defendant introduced some evidence to the contrary but the jury was warranted in concluding from all the evidence submitted that the things above referred to were all necessary as a result of the mistaken location of the building, due to the wrong survey. Plaintiff's

contractor testified that about 4,000 cubic feet of extra excavation was made necessary when the building was relocated after the error in the first survey was discovered and a new and correct survey had been furnished, and that the reasonable and customary price for this was six cents per cubic foot, making $240.00 for this item. He also testified that there was about 1,000 square feet of new form work required, at seven cents per square foot, making this item cost $70.00 extra, and that the changes necessitated the taking out of the same amount of form work which had been wrongly placed, and that the reasonable and customary charge for that was three and one-half cents per square foot, which made $35.00 more, or $105.00 for the extra form work. He also testified that 2600 cubic feet of back fill were made necessary by the relocation of the building, at a reasonable and customary cost of six cents per cubic foot, which made $156.00 for this item, and that 13,050 cubic feet of additional concrete work were required, the reasonable and customary charge for which was forty-two cents per cubic yard, which made the latter item amount to $569.00. These items total $1,070.00. The defendant put on a witness who testified to other figures as the usual and reasonable charges for these various items but even if those figures are used the items total more than the $800.00 which the jury awarded. The plaintiff was claiming other items which the jury apparently disregarded, such as loss in interest and rent caused by the delay in erecting the building because of the time lost in getting a correct survey. In our opinion the contention that the damages are excessive is without merit.

the figures are economies in without merit.

Building a borrowed economy. In our opinion the economies that are claimed by the building Pension at the time just is simply ridiculous, such as loss in interest and rent caused by the Pilotability with existing other items which the Jury subsequently found total more than the $100.00 which the Jury awarded. These various items but even if those figures are used the other figures as the actual and reasonable charges for $1,040.00. The defendant put on a witness who testified made the latter item amount to $800.00. These items total only charge for which was forty-two cents per cubic yard, which ditional concrete work was required, the reasonable and customfive hundred ($500.00) for the removal of the building, as a reasonable and customary work of six cents per cubic foot, which was necessary by the reduction of the building, as a reasonable item testified that 3000 cubic feet at least fill here made $30.00 more, or $180.00 for the extra face work. He for that was eight and one-half cents per square foot, right exactly placed, and that the reinforcing contemplated shows item cost $40.00 extra, and that the charges contemplated the taking out of the rear corners of these vaults and face that work required, at extra cost per cubic foot, which item testified that there was about 1,000 extra feet of bar $40.00 for the six items. In the reasonable and customary value for this six work done and charges per square foot, but that these were considered, and that evaluation was made necessary along the building and the concrete foundation testified that cost about $,000 more feet of extra

It is further contended that the damages were due to the plaintiff's own negligence, in that the error in the defendant's survey was known before the work on the plaintiff's building was begun. We have carefully examined all the evidence in the record and in our opinion it in no way supports this contention. The contention rests upon the testimony of plaintiff's president to the effect that he consulted defendant about the mistake in the survey "about the 25th of November" and that of the contractor, who testified the work on plaintiff's building was begun about December 5. In our opinion, it is entirely clear, not only from the testimony of plaintiff's president, but also other evidence in the record, that he really consulted the defendant about the mistake in the survey, in the month of December, and that the parts of the work to which reference has been made, were done before the mistake was discovered. It is shown that the work was stopped by the City when the latter discovered that the building was being put in sixteen feet beyond the street lot line.

We find no error in the record. The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

It is further contended that the damages were the
to the plaintiff's own negligence, in that the cause of the
defendant's entry was known before the work on the ditch
call's building was begun. He knew beforehand all
its evidence in the record and in my opinion it is no
recover this contention. The contention rests upon the
testimony of plaintiff's receipt to the effect that he
received information about the statute in the summer "about
the 20th of January" and that of the contractor, who there
after the work on plaintiff's building was begun about
January 8th. In our opinion, it is entirely clear, not only
from the testimony of plaintiff's principal, but also other
evidence in the record, that he notify contractor its lateral
about the statute in the summer, in the month of December,
and that the date of the notice to which reference has been
made, was some before the statute was discovered. It is
clearness that the building was being put in sixteen feet
beyond the street lot line.

It find no error in the record. The judgment of
the municipal court of Dekalb is affirmed.

426 - 50760

CHARLES W. HELSEL,

Appellant

v.

M. L. RAU,

Appellee.

243 I.A. 607

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The defendant, Rau, was the owner of a building in which he conducted a department store known as Rau & Company. It was located in the city of Chicago Heights. There were some twenty departments in the store. Six of these departments, apparently each located in a separate store room, were conducted by tenants, and the remainder were conducted by Rau & Company. The entire store, both the departments conducted by the Company directly and those conducted by the various tenants, was known as Rau & Company, and all the advertising of all the departments was done under the name of the Company. Those departments which were conducted by tenants, were the subject of leases from the defendant Rau to the respective tenants, the latter paying as rent, a stipulated percentage of the gross receipts of the departments. What was known as the bakery department, was conducted by the complainant Helsel, in a store room in the defendant's building, which was referred to in the lease executed by the parties, as Number 63, 16th street, Chicago Heights.

The lease provided that Helsel was to conduct a general bakery business in the leased premises and pay the defendant Rau eight per cent of his gross sales, as rent. It provided further that Helsel was to install a cash register in his store, satisfactory to the defendant, and that each of the parties was to keep an accurate account of all sales, by means of this register and that Helsel was to make a complete report of his sales each Monday, covering the preceding week. The lease also provided, that Rau was to have the right to check up the sales, receipts and reports of Helsel, and that the latter would permit Rau or his representatives to go over his books and records for that purpose.

Under the terms of the lease, Rau was required to furnish all the heat, electric light and water used by Helsel in the conduct of his bakery business. It also provided that it was especially understood and agreed that the tenant would at all times conform to the general rules and regulations of the store known as Rau & Company.

The complainant filed his bill of complaint in this cassin the City Court of Chicago Heights, setting up the substance of the foregoing facts, and alleging that he had at all times carried out the provisions of the lease, but that not long after he had taken possession of the store room and installed extensive fixtures suitable for the conduct of a bakery business, the defendant "began a series of petty annoyances" toward the complainant, and so conducted himself that the complainant "became convinced

*** that he so acted for the direct purpose of making trouble for your orator," and to drive him from the premises. A number of these alleged petty annoyances were set out in the bill, relating to the dumping of garbage and ashes, the claim of the defendant that the condition of the bakery was not sanitary, and that defendant demanded "repeated readings of the cash register during the day," which complainant alleged were useless to either party.

The lease was dated October 1, 1923, and was for a term of five years. The defendant served a notice on complainant on January 23, 1924, relating to his dumping ashes on the premises and directing him not to do so, and on January 28, a notice was served by defendant on all his tenants, including the complainant, to the effect that beginning on that "day departments will be closed promptly at 6 P. M. and remain closed until 7:30 the following morning" with the exception of Wednesdays and Saturdays, and further, that all departments were to be closed on Sundays, except the drug department. It was shown by the evidence that complainant refused to comply with that notice, claiming that the defendant had agreed he might run his bakery business as he saw fit. The complainant further alleged in his bill that on February 1, 1924, he was served with another notice by a representative of the defendant to the effect that because of his failure to comply with the covenants, agreements and conditions of his lease, a number of which were specified in the notice, defendant had elected to terminate the lease and complainant was notified to deliver possession of the store room he was occupying, within ten days.

Complainant alleged further in his bill that all the alleged breaches of the lease referred to in said notice had been "trumped up" bythe befendant, who was thereby seeking to avoid the lease and oust the complainant from the premises, and further that defendant had himself failed to comply with all the provisions of the lease. It was also alleged by complainant that, on the day of the bill of complaint was filed, the defendant had shut off the complainant's electric light current and his water supply and closed an opening between the store room occupied by the bakery shop and the adjoining department of Rau & Company, which was a drug store, and that complainant had been informed defendant was about to shut off the heat and that he "fears" defendant might take some action to close up his front and rear entrances and also that he might institute proceedings in justice courts in points in Cook County far removed from Chicago Heights, for possession of the premises which complainant would be compelled to defend"with great loss of time and money." Complainant also alleged that he"fears that defendant will so interfere with his business by the foregoing means and otherwise" as to cause him great loss resulting in the foreclosure of chattel mortgages on his furniture and fixtures, and possible bankruptcy proceedings.

Complainant prayed that defendant might be enjoined from interfering with his business and with his use and occupation of the store room, in which such business was conducted; from instituting any suits against him to oust him from the premises; from interfering with the heating and lighting of the building and furnishing water thereto and from closing the opening between the bakery

store and the drug store.

A temporary injunction was issued bythe City Court of Chicago Heights, restraining the defendant as prayed by complainant. This injunction order directed defendant to furnish the complainant with light, water and heat; to open that passage way between the store room and the drug store and "reconnect and restore all electric light and power wire circuits carrying electricty to said store."

The defendant filed his appearance and had the cause removed by petition for change of venue, to the Circuit Court of Cook County. He then filed a demurrer to the bill, which he later withdrew, and he then filed an answer. The complainant had not set up the lease in his bill. The defendant set it out in full in his answer. He denied that he had breached the covenants of the lease in any way but alleged "that the complainant has violated the said lease and should be ousted from the premises." He alleged that his demands for readings of the cash register had been within the terms of the lease and had not been useless as complainant alleged. He admitted

he had disconnected the electric power line of complainant from defendant's power current, as that was not covered by the lease. He set forth in detail a number of alleged violations of the terms of the lease by complainant.

The cause was referred to a master, who heard evidence and filed a report setting forth his findings of fact. He reported that, in his opinion, complainant had failed to comply with certain terms of the lease and that there "was no warrant in law for restraining the defendant,

under the evidence in this case, from prosecuting a suit at law," by reason of such violations, and that, in his opinion, the temporary injunction which had been issued should be dissolved. He further set forth that complainant had paid nothing to the defendant since the filing of the bill and that, in his opinion, the decree entered should provide for a re-reference to the master "to state the amount of the indebtedness of the said complainant to the defendant Ham, under the terms of the lease, for use and occupation of the premises in question herein." The master also reported that it appeared from the evidence that the matter complained of with relation to the light, water and opening of passage from the bakery to the drug store, which had been the subject of a mandatory injunction, "has been complied with."

Certain objections and exceptions to the master's report were overruled and the chancellor entered a decree affirming the report, finding that complainant had violated certain provisions of the lease, that the "mandatory injunction which was issued against the defendant" and his agents "has been complied with," and that "the defendant is entitled to the possession of the said premises described in said lease *** as against the complainant, and was so entitled on February 1, 1924," and that "the complainant, in addition to any other liability, is liable to the defendant for the reasonable value of the use and occupancy of said premises from February 1, 1924," (ten days from the date of the notice to quit).

The decree of the court, after confirming the report of the master, dissolved the temporary injunction

which had been issued, taxed the master's fees equally between the parties and referred the cause back to the master "to state the account between the parties." Complainant perfected his appeal from that decree.

In our opinion, the decree appealed from should be treated as a final decree and from which an appeal will lie. It is, in effect, a decree awarding an accounting to the defendant, Such a decree is appealable. People v. Small, 319 Ill. 437.

It is clear from a reading of the lease executed by the parties, that it did not cover the item of electric power, and the defendant was under no obligation to continue the privilege he had accorded the complainant, of connecting with defendant's source of power. It is equally clear that the lease obliged the defendant to furnish the complainant with all the electric light, heat and water needed to conduct the bakery shop. Even if we assume complainant had not complied with all the covenants of the lease, the defendant might have brought appropriate proceedings against him but he was not warranted in discontinuing that service. Under all the facts in evidence, we are also of the opinion, complainant was entitled to have the passageway between his store room and the drug store kept open. We are further of the opinion that complainant, having been deprived of these items of service contracted for in the lease, did not have an adequate remedy at law, and was entitled to invoke the aid of a court of equity in regard to having them restored to him. The defendant did not pray an appeal from the temporary injunction. He complied with its terms and joined issue on the merits. We however are further of the opinion that equity did not

have jurisdiction to restrain the defendant from instituting proceedings at law to gain possession of the premises by reason of alleged breaches of the lease by the complainant. Nor could defendant have invoked the jurisdiction of a court of equity for such a purpose.

But inasmuch as complainant came into a court of equity to gain restoration of his electric light and water service, and to assure continuance of his heat and the maintenance of the opening between the bakery shop and the drug store, he must have come into that court with clean hands or he would not be entitled to the relief sought. Defendant contends that complainant, because of his violation of certain terms of the lease, had not come into equity with clean hands. The master supported that contention in his report and the chancellor confirmed that finding. The breaches of the lease referred to in the decree were those involving the refusal of the complainant to permit the reading of his cash register by a representative of the defendant at times requested, which were found to be reasonable, and the refusal of the complainant to comply with the notice as to the closing time for all departments of Rau & Company, except the drug store, which the court found to be "a reasonable rule and regulation under the terms of said lease." In our opinion, the record supports the decree in those matters. The fact that the refusal of complainant to comply with the notice, fixing the hours of closing, was not referred to in the forfeiture notice served on the complainant, is not material.

The chancellor having made the findings above referred to, we are of the opinion the temporary injunction should have been dissolved and the complainant's bill dismissed. The court did dissolve the temporary injunction, but then proceeded to award the defendant affirmative relief to which he was not entitled, as the proceedings stood. The defendant alleged in his answer that complainant had failed to comply with certain terms of the lease and that he should be ousted from the premises. But he did not filesa cross-bill and seek affirmative relief in that regard nor did he claim he was entitled to compensation from complainant on the basis of use and occupation from and after February 1, 1934. Such being the state of the record, we are of the opinion the chancellor was not warranted in awarding the defendant such affirmative relief.

For the reasons stated, the decree of the Circuit Court is reversed and the cause is remanded to that court with directions to dismiss the bill of complaint. Complainant contends that the fees awarded the master were excessive. No objection was made to them in the trial court and in our opinion the contention is not tenable. The chancellor taxed these fees as costs and ordered that they be paid equally by the complainant and the defendant. The complainant is certainly in no position to complain about this now. One half the costs in this court will be taxed against the complainant and one half against the defendant.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Taylor, P.J. and O'Connor, J. concur.

505 - 30769

H. L. WALLACH and
S. W. WALLACH,

Appellees,

v.

YELLOW CAB COMPANY,
a corporation,

Appellant.

243 I.A. 608

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $90.65 recovered against it by the plaintiffs in the Municipal Court of Chicago, in an action brought by the latter to recover damages caused, when a cab belonging to the defendant company collided with a Ford in which the plaintiffs were riding.

Sarah W. Wallach was the wife of H. L. Wallach. The latter was the sole plaintiff originally. In February, 1925, leave was granted to amend by making Sarah W. Wallach a co-plaintiff. Five months later the case was tried. The body of the statement of claim was not amended. During the course of the trial Mrs. Wallach testified, apparently without objection. After the plaintiffs had rested their case, counsel for the defendant moved to strike out the testimony of Mrs. Wallach "on the ground that the affidavit or statement of claim is false," in that it stated that the car was owned by H. L. Wallach and that he had suffered the damages com-

E. E. Wallace and
H. C. Stanley,
Appellees,

v.

Illinois Bell Telephone
& Construction,
Appellant.

Opinion filed Oct. 15, 1924.

2431.C08

Contract under
Construction
Co Opinion.

MR. JUSTICE THOMSON delivered the opinion

of the court.

plained of. In our opinion the motion to strike out the testimony of Mrs. Wallach was properly overruled. After she had been made a co-plaintiff, the expressions in the statement of claim, "plaintiff's claim" and "plaintiff's car," necessarily referred to both plaintiffs. Whether the statement of claim, originally referring to M. L. Wallach only, was inadvertently drawn does not appear. Each of the parties plaintiff testified that they were part owner of the car. There was no showing to the contrary.

The collision between the plaintiffs' Ford car and the defendant's cab, occurred at the right angle intersection of Sheridan Road and Pine Grove Avenue in the City of Chicago. Sheridan Road is a boulevard and runs east and west, where it crosses Pine Grove Avenue, a north and south street. The collision occurred early in the evening, on October 17, 1924. The traffic moving west in Sheridan Road was very heavy at the time. No traffic except the cab of the defendant was moving east in Sheridan Road. The plaintiffs were going south in Pine Grove Avenue.

Mr. Wallach testified that he stopped at Sheridan Road about twenty feet north of the curb line, behind a car that was proceeding south ahead of him. The west bound traffic in Sheridan Road, consisting of several lines of cars, was stopped. The block west of Pine Grove Avenue was filled with west bound traffic in the north half of Sheridan Road and the same condition existed east of Pine Grove Avenue. Mr. Wallach testified that one of the cars in Sheridan Road backed up so as to permit them to go through in front of it;

that in proceeding across Sheridan Road he "came very close to a stop" in the center of the boulevard and looked toward the west and he could see the lights shining from Broadway (the next north and south street west of Pine Grove Avenue) but "there were no cars in sight and he proceeded on across Sheridan Road and was about half way across the south half of the street when the Yellow cab struck the Ford car. This witness identified the receipted bill for the repairs to his car, which bill was received in evidence. Mrs. Wallach gave substantially the same testimony. She testified that traffic to the west on Sheridan Road was blocked as far as she could see; that the west bound traffic in Sheridan Road was moving as she and her husband came up to it and it came to a stop and then her husband drove ahead following another car going south; that she could not see all the way to Broadway "as my vision was obstructed by other cars standing in line," and that as they proceeded south she could see farther west in Sheridan Road "and at no time as we proceeded south did I see the cab till the crash came." She testified her husband was driving about five miles an hour at the time of the collision. Mr. Wallach testified he was driving between five and eight miles an hour as he crossed Sheridan Road. Mrs. Wallach further testified that the collision occurred "about 6:30 in the evening as the day was growing dusk, - the street intersection lights were lit."

A woman named Eggers was in the front line of cars in Sheridan Road at Pine Grove Avenue as the Ford car passed, going south. She testified that when she first saw that car, it had stopped; that it then started up and got into the center of the south half of Sheridan Road when the defendant cab collided with it, and that the Ford car was going about

five miles an hour at the time of the collision, and the cab was going about thirty miles an hour. On cross-examination she testified that the west bound traffic in Sheridan Road was standing still as Mr. Wallach crossed it; and that from where she sat on the right hand side of a Ford coupe in the line of west bound traffic nearest the center of Sheridan Road, she could see half way down to Broadway on the south side of Sheridan Road, "but not on the north side because of the cars going west."

One Glennon, called by the defendant, testified he was in the south line of the west bound traffic in Sheridan Road, with the front wheels of his car standing "at the east line of the intersection, and that all of the west bound traffic was at a stand still. He testified that "Mr. Wallach was traveling approximately five miles an hour," and that "the cab was traveling twenty miles an hour, possibly a little more, maybe a little less." The defendant's chauffeur testified that the collision took place "about 5:30 in the evening, at which time it was still light." He said he was driving fifteen miles an hour; that there were three lines of cars going west in Sheridan Road and that these were moving when he reached Pine Grove Avenue; that the Ford car "was ten feet from me going south," and as soon as he saw it he turned to the right and tried to stop and avoid a collision. He also said the Ford car was being driven "about five miles an hour." He said he did not see Wallach "do anything to avoid the accident." On cross-examination he said the lights on his cab were not lighted and also that he was driving "slightly to the right of the center line of the street."

The defendant contends that the trial court erred in denying its motion for a peremptory instruction directing the jury to find it not guilty, both because the evidence is such that the plaintiffs should be held to have been guilty of contributory negligence as a matter of law, and because it fails to show that defendant's chauffeur was guilty of negligence. In support of the first proposition counsel cites a number of cases involving crossing accidents, where a plaintiff had proceeded over a crossing, where he had an unobstructed view but either did not look or said he did look but saw nothing. That was not the situation here. The view of the plaintiffs was obstructed to the west by the lines of west bound cars standing in Sheridan Road. There was testimony to the effect that it was dusk and the street lights were lighted. Defendant's chauffeur testified his lights were not on and he was driving close to the south line of the west bound traffic. Whether plaintiffs were guilty of contributory negligence in failing to see him as they drove slowly across Sheridan Road, was clearly, in our opinion, a question for the jury to pass upon. The same is true as to the question of the negligence of the defendant's chauffeur.

The defendant contends that the trial court erred in the charge to the jury, in several respects. In our opinion this contention is not tenable. In the course of his charge the court referred to the question of right of way where a vehicle is approaching an intersection and another vehicle approaches from the right. At the close of the charge a juror asked a question as to this part of the court's charge. He

apparently wanted to know whether the rule referred to, applied only where the two vehicles reached the intersection simultaneously or whether the vehicle approaching from the right still had the right of way "if it happened to be down the street further." In answer to the juror's question the court added to the charge he had previously given, and objection was made to what the court said in this additional charge, and it is now relied upon as error. In our opinion, the language the court used was not clear. Whether it tended to enlighten or to confuse the jury, we cannot say, - unless we add that in our opinion, in view of the evidence submitted to the jury, they were warranted in finding the issues as they did. We are further of the opinion that the substance of what the court said to the jury in the additional charge, in answer to the juror's question, was not such as would justify this court in disturbing the verdict.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

514 - 30778

AGNES JOHNSON,

Appellee,

v.

YELLOW CAB COMPANY, a corp.,

Appellant.

243 I.A. 608

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Agnes Johnson, brought this action against the defendant, Yellow Cab Company, to recover damages suffered as the result of injuries received by her when she was struck by one of the defendant's cabs. The jury found the issues in her favor and assessed her damages at the sum of $6500.00. Judgment was entered against the defendant for that amount, from which this appeal has been perfected.

The accident involved, happened about 7:30 in the evening on June 15, 1923, in front of the Englewood Union Depot on 63rd street, in the city of Chicago. That depot is on the south side of 63rd street, which runs east and west and contains a double track street car line. The tracks of the Pennsylvania Lines cross 63rd street, at the west side of the depot, and to the east are the tracks of the New York Central, the Rock Island and the Nickel Plate railroads. All these tracks are elevated, passing over 63rd street on steel structures. The various witnesses refer to the subways under these tracks along 63rd street,

ADAMS COUNTY.

Appellee,

v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellant.

2431 A. 608

APPEAL FROM

CHANCERY DOCKET.

Opinion filed Oct. 18, 1898.

MR. JUSTICE THOMPSON delivered the opinion of the court.

The plaintiff, Agnes Johnson, brought this action against the defendant, The Chicago, Rock Island and Pacific Railway Company, to recover damages sustained on the result of injuries received by her when she was struck by one of the defendant's cars. The jury found the issues in her favor and assessed her damages at the sum of $5000.00. Judgment was entered against the defendant for that amount, from which this appeal has been perfected.

The accident involved, happened about 7:30 in the evening on June 18, 1895, in front of the Englewood Union Depot on 63rd street, in the city of Chicago. That depot is on the south side of 63rd street, which runs east and west and contains a double track street car line. The tracks of the Pennsylvania lines cross 63rd street, at the west side of the depot, and to the east are the tracks of the New York Central, the Rock Island and Chemical Plate railroads. All these tracks are elevated, passing over 63rd street on steel structure. The various elevated

the one west of the depot leading under the Pennsylvania tracks, toward La Salle street, the first street to the west, and the other, east of the depot, leading under the tracks of the other roads referred to, toward State street, the first street to the east. There is no subway in 63rd street, in front of the depot. On the north side of 63rd street, between the two subways and opposite the depot, is a retaining wall with a stairway leading up to the railway platforms. The plaintiff had planned to go to an amusement park located on 63rd street, some distance east of the depot, that evening, with several other young women, most of them fellow employees of hers at the offices of the Rock Island Railroad. They were to meet on 63rd street at the depot. The plaintiff was the last one to arrive. Her friends were waiting for her on the sidewalk on the north side of 63rd street, opposite the depot. The plaintiff reached their point of meeting on an east bound 63rd street car, which stopped in front of the depot, - a regular stopping place. She testified that she got off the car from the front platform, and the car passed on to the east; that she stepped over near the south curb and looked east and west and saw no vehicle approaching, and started across the street to the north; that "as I entered the west-bound track I looked to the east and I saw a vehicle coming under the second elevation * * * and it seemed I got about two or three feet from the curb, and I don't remember any more." Apparently the tracks crossing 63rd street east of the depot were carried on two elevations over the street, one east of the other. The plaintiff further testified, "As I was in the west bound track, as I looked east, the car (Yellow cab) was underneath the elevation * * * it was just

(Yellow cab) was underneath the elevation * . * It was just
I was in the west bound track, as I looked east, the car
one east of the other. The plaintiff further testified, "As
the depot were marked on two elevations east the street,
more," Approximately the tracks crossing 52nd street east of
two or three feet from the curb, and I don't remember any
under the second elevation " " and it seemed I got about
bound track I looked to the east and I saw a vehicle coming
across the street to the north; that "as I entered the west-
east and went and saw no vehicle approaching, and observed
east; that she stepped over near the south curb and looked
car from the front platform, and the car passed on to the
regular stopping place. She testified that she got off the
52nd street car, which stopped in front of the depot." - A
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an amusement park located on 52nd street, some distance to
the railway platforms. The plaintiff had planned to go to
depot, in a returning well with a streetcar leading up to
of 52nd street, between the two subways and opposite to the
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street, the first street to the east. There is no subway
tracks, toward 52nd street, the first street to the
tracks of the other roads mentioned to, toward depots
west, and the other, east of the depot, leading under
the one west of the depot leading under the Pennsylvania

about ready to come out * * * I should judge that was about fifty feet from the point where I was crossing. At that time I was in the west bound track."

On cross-examination, the plaintiff testified that at the time she looked east, the street car was thirty or forty feet away and she could see as far as the railroad elevation,- "when I was just approaching the west bound track, and the structure of the elevated prevented my view to see through it, so after I got in the west bound track, I looked again and saw the vehicle * * * I had advanced into the west bound track before I saw the cab for the first time * * * It was about fifty feet away * * * I went on at the same gait." She said she was walking. The record shows that there was a row of columns supporting the railroad superstructure, located in the center of 63rd street between the two street car tracks, and these obstructed plaintiff's view of the approaching cab before she got opposite it, or nearly so. The defendant's chauffeur who was driving the cab, testified that he passed the east bound street car just after he emerged from the subway under the railroad tracks east of the depot; that he was almost through the elevation when he saw the street car; that "the posts that supported the structure might prevent my seeing the street car until I got out from under" the elevation; that these posts "would prevent me from seeing anything coming from the south at a distance. I would not see anything else coming from the south across the street until I would get through the elevation." It is apparent that in the same way, one crossing the street where the plaintiff did, would not be likely to see the approaching cab, because of the posts referred to, until it came through the

subway or until such person reached a point opposite the approaching cab or nearly so.

There were nine occurrence witnesses, supporting the plaintiff's theory of the case, all but two of them young women in the group waiting for her on the north sidewalk. One of the other two was a young man who was crossing 63rd street from north to south, a little west of the point at which plaintiff was crossing in the other direction, and at the same time. The other was a telegraph operator, who saw the accident through the window of his office in the depot.

Several of plaintiff's occurrence witnesses did not see her before she was struck by the Yellow cab. All who did see her before then and watched her crossing the street, said she walked across at a regular gait and was not hurrying. All the occurrence witnesses testifying for the plaintiff, said she was lying underneath the cab when it came to a stop, with her head out in front of the cab between the front wheels, and that she was lying nearer the curb than the west bound street car track, some of them putting her only two or three feet from the north curb of the street. The distance from the curb to the west bound street car track was eleven and one-half feet. The plaintiff's witnesses estimated the speed of the cab as it approached the place of the accident, at from twenty to thirty miles an hour. Some of them said the plaintiff was dragged a few feet, - one said ten feet - after she was struck. The cab wheels did not run over any part of the plaintiff's body.

The plaintiff testified that she saw "some vehicles

approaching car or nearly so.

There were nine eyewitness witnesses, supporting the plaintiff's theory of the case, all but two of them young women in the crowd waiting for bus on the north sidewalk. One of the other two was a young man who was crossing Elm street from north to south, a little west of the point at which plaintiff was crossing in the other direction, and at the same time. The other was a telegraph operator, who saw the accident through the window of his office in the depot.

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The plaintiff testified that she was "some nervous

parked at the north side of the street. They were to the east of where I was crossing." Five of the young women in the group standing on the north sidewalk waiting for her, testified to the presence of these vehicles. They were automobiles. Some called them cabs. One of the young women who testified for the plaintiff said she saw no vehicles in the street at the point referred to. The young man who was crossing the street just west of the plaintiff, and also the young man who was in the telegraph office, said the cars were there. Three of the young women testifying for the plaintiff said the Yellow cab came into contact with one of these standing cabs and then swerved over to the north out of the rails of the west bound street car track, and struck the plaintiff when she had reached a point mid-way between that track and the north curb, or farther. All occurrence witnesses for the plaintiff, described the swerve of the cab to the north, just referred to, but only three of them mentioned that it came into contact with another car.

The defendant offered five occurrence witnesses - the driver of the cab, a passenger who was riding in the cab, two women who were sitting in an automobile standing near the south curb and facing east, a little to the west of the plaintiff as she crossed the street, and a man who was on the north sidewalk.

The cab driver said he was driving in the track as the north roadway was in poor condition; that he was going eighteen miles an hour; that he saw no vehicles on the north side of the street; that as he passed the east bound street

car, he saw plaintiff in the east bound car track, running across the street, looking straight ahead; that he was eighteen or twenty feet away from her then; that he immediately sounded his horn, put on his brakes and swerved to the right to avoid striking theplaintiff, who kept on going and just as he got his cab to a stop, "she ran against, or came in contact, you might say, with the left front fender, and fell down." He said his cab did not strike any car before or after striking the plaintiff and that his left front wheel was between the rails of the west bound track when he came to a stop. The passenger testified that it did not collide with any other automobile; that "up to the time of the accident the cab seemed to me to be going absolutely normal. Suddenly the brakes were put on very quickly and the car lurched forward and the driver jumped down * * * and ran around in front * * * and picked up this young girl from the side of the car." The women sitting in the car parked on the south side of the street said plaintiff ran across the street. One of them said the driver of the cab "tried two or three times to sway his car to the right to avoid hitting this girl * * * I saw the driver of this cab drive onto the track, and off the track, and onto the track, and off the track. He did that about two or three times." She said the plaintiff ran into the left front mud-guard and after that the cab did not move; that just before the accident the cab was going eighteen or twenty miles an hour; that plaintiff "at the time she was struck was north of the west bound rail. She was about in the middle of the two rails. The machine was entirely outside of the track." The other of these two women testified

the right to avoid striking [illegible], who kept on
[illegible] nearly [illegible] but on his brakes and swerved to
[illegible] sounded his horn, but on his brakes and swerved to
eighteen or twenty feet away from her sheet that he immedi-
ately [illegible] the street, locking [illegible] that he was
not, he saw plaintiff in the east bound car track, running

the plaintiff was "about four or five feet north of the west bound track when she was struck."

The man who was on the north sidewalk, who testified for the defendant, said the plaintiff "was kind of running northwest * * * and just the front fender and the wheel bumped her right down in the north track. At another point he said, "She came in contact with the side of it. It was as far back as the wheel. It was somewhere between the door and the front of the cab that she came in contact with it." He testified the cab was moving at the time the plaintiff came into contact with it, - "I should judge about ten miles an hour. Not that much, because he had his brakes pretty near applied for good * * * He went about ten feet past her when he stopped." Those of the defendant's occurrence witnesses who were interrogated on the question, said they saw no cars along the north side of the street.

On that evidence, both the question of plaintiff's contributory negligence, and the defendant's negligence, were, in our opinion, for the jury to pass upon and we could not say that the jury's finding is against the manifest weight of the evidence on either of those questions. The admitted speed of the cab as it emerged from the east subway to pass the depot, in front of which was a regular street car stop, from which a car had just passed to the east, was prima facie negligence under the statute. It is contended the statute did not apply. The question of whether a given locality is a "closely built up" neighborhood does not alone depend on the number of structures

near by. The retaining wall along the north side of the street and the space occupied by the tracks passing over the elevated structures, may not be availed of in an effort to show that the percentage of space occupied by stores and other structures, was so low as to mean that the neighborhood was not closely built up. This was an unusually busy spot. Unquestionably, it was such as to come within the statute referred to.

It is apparent from the testimony to which we have referred, that this is not a case where a plaintiff, with an unobstructed view of an approaching vehicle, attempted to cross its path without looking, or one where the plaintiff looked and said she saw nothing. At the time the plaintiff in the case at bar did look to the east and failed to see the cab approaching, her view was obstructed. When she could see under the subway and on the north side of the center posts, she looked again, and then saw the cab. She was then in the west bound street car track, she said, and the cab was approaching in that track and fifty feet away. If that was the situation, it was quite natural for her to continue as her witnesses described, at the same gait, and if she did and the cab had kept in the west bound track, she would not have been struck. Whether that is actually what took place, or whether she was running and collided with the cab herself, was, as we have said, a question for the jury to determine on the conflicting evidence before them.

It is contended the verdict is so excessive as to indicate passion and prejudice. We do not consider it so. The plaintiff was a young woman twenty-one years of

age, employed as a comptometer operator. She had been in perfect health. The evidence submitted in her behalf tended to show that she suffered a skull fracture, involving the right middle ear; that she was unconscious for some time and was in the hospital twenty nine days, and then at home convalescing for about two months, after which she returned to her work at her former salary. After returning to work she had to rest frequently and at times he excused for the day before the regular closing hour. She experienced severe headaches, dizzy spells and some loss of memory. Her doctor's and hospital bills amounted to $1225.00.

The defendant also contends that the trial court erred in thegiving of two instructions to the jury. The first was to the effect that one operating a motor vehicle upon a public highway, is in law bound to know that the public has a right to the lawful use of the highway and it is the duty of such person to exercise ordinary care in the operation of such vehicle, and to take reasonable precautions to avoid injuring other persons who are lawfully using the highway. The other instruction was to the effect that it is the law in Illinois that no person shall drive a motor vehicle upon a public highway at a speed greater than is reasonable and proper, having regard for the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person. These instructions were correct statements of the law. They were abstract in form but they applied to the questions involved. While it is not error to refuse such instructions, it is usually not error to give them, provided they are applicable. The second instruction re-

egg", employed as a correspondent typewriter. She had been in perfect health. The evidence submitted in her behalf tended to show that she suffered a skull fracture, involving the right middle ear; that she was unconscious for some time and was in the hospital twenty nine days, and then at home convalescing for about two months, after which she returned to her work at her former salary. After returning to work she had to rest frequently and at times be excused for the day before the regular closing hour. She experienced extreme headaches, dizzy spells and some loss of memory. Her doctor's and hospital bills amounted to $1888.00.

The defendant also contends that the trial court erred in charging at the instructions to the jury. The first was to the effect that one operating a motor vehicle upon a public highway, is in law bound to know that the public has a right to the lawful use of the highway and it is the duty of such person to exercise ordinary care in the operation of such vehicle, and to take reasonable precautions to avoid injuring other persons who are lawfully using the highway. The other instruction was to the effect that it is the law in Illinois that no person shall drive a motor vehicle upon a public highway at a speed greater than is reasonable and proper, having regard for the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person. These instructions were correct statements of the law. They were construed in Town Unit they applied to the questions involved. While it is not error to refuse such instructions, it is usually not error to give them, briefed they are applicable. The second instruction re-

ferred to, advised the jury as to the law which was applicable, in the language of the statute. It is not error to give such an instruction in abstract form. Darnley v. Hibbard, 222 Ill. 88. As to the first instruction, it is urged that it was likely to mislead the jury because one might be lawfully using the highway as defined in the instruction and yet not be in the exercise of due care, and as to the plaintiff's use of the highway, that was the real question presented, namely, whether she was in the exercise of due care. The contention made is, in our opinion, untenable. The instruction was not mandatory. It could not have misled the jury in view of all the other instructions given. The trial court gave the jury five instructions at the plaintiff's request, and thirty-three submitted by the defendant. These gave the jury all the instruction the defendant could have wished, on the question of contributory negligence. One was in substance the converse of the instruction objected to, telling the jury that the plaintiff was just as much in duty bound to exercise ordinary care to look out for and to avoid colliding with the cab, as the driver in charge of the cab was to look out for and avoid colliding with the plaintiff, - that one was not held in law to any higher degree of care than the other.

We find no error in the record and therefore the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

feared to, advised the jury as to the law which was applicable, in the language of the statute. It is not error to give such an instruction in abstract form. Barnley v. Highway, 282 Ill. 88. As to the first instruction, it is urged that it was likely to mislead the jury because one might be lawfully using the highway as defined in the instruction and yet not be in the exercise of due care, and as to the plaintiff's use of the highway, that was the real question presented, namely, whether she was in the exercise of due care. The construction made is, in our opinion, untenable. The instruction was not misleading. It could not have misled the jury in view of all the other instructions given. The trial court gave the jury five instructions at the plaintiff's request, and thirty-three submitted by the defendant. These gave the jury all the instruction the defendant could have wished, on the question of contributory negligence. One was in substance the converse of the instruction objected to, telling the jury that the plaintiff was just as much in duty bound to exercise ordinary care to look out for and to avoid colliding with the car, as the driver in charge of the car was to look out for and avoid colliding with the plaintiff, - that one was not held in law to any higher degree of care than the other.

We find no error in the record and therefore the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J., VAN O. JOHNSON, J. BOUCHER.

523 - 30787

IN RE PETITION OF ROYAL NORDLUND, Insolvent Debtor, On appeal of ROYAL NORDLUND,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

243 I.A. 608

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

Henry Merle Williamson having recovered a judgment against Royal Nordlund and others in an action in tort, in the Circuit Court of Cook County, the said Nordlund was taken into custody by the Sheriff on a writ of capias ad satisfaciendum. Subsequently, Nordlund filed his petition in the County Court, seeking his release from such arrest, upon delivering up his property, as provided by the statute. The trial court held that it appeared from the face of the record in the tort action, that malice was the gist of the action and therefore the statute did not apply, and Nordlund was remanded to the custody of the Sheriff. From that judgment, this appeal has been perfected.

If malice was the gist of the tort action in the Circuit Court, in connection with which Nordlund was taken into custody by the Sheriff, he was not entitled to be discharged from such custody under the statute. To entitle him to such discharge, it must appear that the wrong for which the tort action was brought was not of that class of wrongs of which malice is the gist of the action. Jernberg v. Mix, 199 Ill. 354;

Opinion filed Oct. 13, 1896.

Kenny v. Knight, 292 Ill. 206.

In order to procure his discharge on petition in the County Court, it was incumbent on the petitioner to show that he was imprisoned in a civil action of which malice was not the gist. Mahler v. Sinsheimer, 20 Ill. App. 401.

The question of whether malice was the gist of the action must be determined from the face of the record when that affords the means of such determination. Masterson v. Furman, 89 Ill. App. 291; In re Mitzke's Petition v. Greer, 195 Ill. App. 206.

The declaration in the tort action in the Circuit Court, in connection with which the petitioner in the case at bar was taken into custody by the Sheriff, contained two counts both charging the defendants, one of whom is the petitioner here, with malicious prosecution. Malice was necessarily the gist of both counts. The defendants, including the petitioner here, filed a plea of the general issue and the one of the defendants who is the petitioner here, also filed a special plea of justification, alleging therein that he had acted without malice and on advice of counsel, in having Williamson arrested on a charge of larceny. No replication was filed in the tort action, to that special plea.

The petitioner, Nordlund, now contends that inasmuch as no replication was filed by Williamson in the tort action, to his special plea, the defense therein set up stands admitted on the record, and therefore the verdict of guilty in that action is not conclusive on the question of malice, and the

Bowers v. Hardwick, 106 S.Ct. 2841.

trial court erred in refusing to admit in evidence the transcript of the testimony taken on the trial of that case.

It appears from the record that no such point was raised by the petitioner in the County Court. On the contrary the record shows that the petitioner tried his case below as though issue had been properly joined in the Circuit Court case. Moreover, the contention is not tenable for several reasons. Our statutes (Cahill's Ill. Sts. ch.7, sec. 6,) provide that no judgment upon verdict or finding of the court shall be reversed, impaired or in any way affected by reason of want of a joinder of the issue. If the defendant Nordlund, in the tort action in the Circuit Court, proceeded to trial, without objection, although issue had not been formally joined upon the special plea he had filed, he must be deemed to have waived the point, Illinois Life Association v. Wells, 300 Ill. 445. But the petitioner contends there is nothing in the present record to show that he proceeded to trial without objection to the failure of Williamson to file a replication to his special plea, and he points out that if he did so proceed to the trial of the tort case, without objection, such fact would appear from the stenographic report of the proceedings in that case, which the County Court refused to consider. It does not appear from the record in the case at bar, that the petitioner offered the stenographic report of the proceedings in the tort case, for the purpose of showing he had objected to proceeding to trial in that case without issue being formally joined on his special plea. At least a part of the stenographic report of the proceedings in the tort case, which petitioner asked the trial court in the case at bar to consider, but which was not admitted in

evidence, has been preserved in this record, but it does not appear therefrom that he made any objection to proceeding to trial without issue being formally joined on his special plea. So far as those stenographic reports have been preserved in this record, they do not show any such contention. If petitioner wished to make and save the point that he had not waived the failure of the plaintiff in the tort action, to join issue on his special plea, by proving from the stenographic record of the proceedings in that case, that he had not gone to trial without objection, but on the contrary, had there made the point, he should have offered the stenographic report of the proceedings for that purpose. And if the trial court in the case at bar had refused to admit the stenographic record in evidence for such purpose, petitioner should have made an appropriate offer of proof or otherwise shown in this record that the proof of the point thus sought to be made was contained in those proceedings. Such is not the record here.

For the reasons stated, the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

30 - 30824

RALPH SOLLITT,
Defendant in Error,

v.

WISCONSIN LIME & CEMENT CO.,
Plaintiff in Error.

243 I.A. 608

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Wisconsin Lime & Cement Co., seeks to reverse a judgment for $722.50, recovered against it by the plaintiff Sollitt in the Municipal Court of Chicago, in an action for damages caused to a Hudson coach belonging to the plaintiff, when it collided with a truck belonging to the defendant.

The defendant contends that the plaintiff failed to prove that the Hudson car belonged to him. The fact of plaintiff's ownership was not put in issue by the pleadings. In his statement of claim plaintiff alleged the claim sued upon was "for damages to his automobile." The affidavit of merits did not deny that the automobile which was damaged belonged to the plaintiff. Defendant merely denied "that the plaintiff sustained damage as alleged in the statement of claim." That did not raise an issue as to the ownership of the automobile which collided with the defendant's truck. Moreover, we are of the opinion the evidence shows ownership in the plaintiff. At the time of the collision the automobile

2431 A. 608

Opinion filed Oct. 15, 1938.

MR. JUSTICE THOMSON delivered the opinion of the court.

was being driven by one Rintz, an employee of the plaintiff. In his testimony, in describing the accident, this witness referred to the automobile as "my car," as defendant points out, but this does not appear in any sense, an assertion that the automobile was his property. The car was repaired by one Kirby. He referred to it as "a Hudson coach belonging to Ralph Sollitt." Defendant alleges that testimony was incompetent on the question of ownership. The record shows no objection was made to it.

Defendant's main contention is that the manifest weight of the evidence is to the effect that the driver of its truck was not guilty of negligence but that the collision was caused by thenegligence of the driver of the Hudson coach. The evidence bearing on those questions is in conflict. We have examined all of it carefully and it is our opinion that the finding of the trial judge, who heard the case without a jury, may not be said to be against the manifest weight of the evidence.

Rintz testified he was driving west in Adams street on the north side of the street, going about 15 miles an hour; that when he reached the east side of the intersection at Kilbourn avenue, the defendant's truck was ten feet south of the south side of Adams street, coming north on the west side of Kilbourn avenue, also going at about 15 miles an hour; that there was no decrease in the speed of the truck but it was first turned to the west in Adams street and then back to the right, resuming its course north in Kilbourn avenue; that he thought there was an increase in the speed of the truck; that the Hudson coach struck the right side of the truck at the rear; that the collision occurred "way over on

was being driven by one Hinds, an employee of the plaintiff.
In his testimony, in describing the accident, this witness
referred to the automobile as "my car," as defendant points
out, but this does not appear in any manner, as a question that
the automobile was his property. The car was operated by one
Hinds. He referred to it as "a Hudson coach belonging to
Ralph Bellis." Defendant alleges that testimony was incompet-
ent on the question of ownership. The record shows no objec-
tion was made to it.

Defendant's next contention is that the verdict
weight of the evidence is to the effect that the driver of
the truck had not been negligent but that the collision
was caused by the negligence of the driver of the Hudson coach.
The evidence bearing on these conditions is in conflict. We
have examined all of it carefully and it is our opinion that
a jury, may not be said to be against the manifest weight of
the evidence.

the driving of the trial judge, who heard the case without
the aid of the record, being about 12 miles on down
that when he reached the west side of the intersection at
Kilbourn avenue, the defendant's truck was ten feet south of
the south side of Adams street, coming north on the west side
of Kilbourn avenue, also being at about 12 miles an hour; that
there was no decrease in the speed of the truck but it was
first turned to the west in Adams street and then back to
the right, resuming its course north in Kilbourn avenue;
that to testify there was an increase in the speed of the
truck; that the Hudson coach struck the right side of the

the west side" of Kilbourn avenue and north of the center of Adams street; that the truck was piled high with stone and "when he made that turn the whole top of the load of his stone came off the truck." If that us what occurred, and we see no reason why the trial judge was not justified in believing this testimony, the plaintiff was entitled to recover.

Defendant's driver testified that the truck was a 3½ ton truck loaded with 8 tons of stone; that he was driving north in Kilbourn avenue on the east side of the street and as he came to Adams street he saw the Hudson coach approaching from the east, - then about 300 feet away, - "coming at a great rate of speed;" that the coach ran into the truck on the east side of the intersection, knocking the rear end of the truck over to the west side and that the impact was of such force as to knock about a ton of stone off the truck. On cross-examination this witness said he did not swerve his truck before the collision occurred. Then he said, "I pulled it over to the left when I saw him coming." If this was the way the accident happened, in our opinion, the coach would have been greatly damaged by the impact. The repair man testified that when the coach was brought in for repairs "it did not necessarily give evidence of a very terrific impact."

Two other witnesses testified for the defendant. One was the driver of another truck belonging to the defendant which was following the truck involved in the accident, about 150 feet behind. The other was driving a car west in Adams street, about 20 miles an hour. He testified the

the west side" of Hillcrest Avenue and north of the center
of Yukon Street; that the truck was filled high with stone
and "when he made that turn the whole top of the load of his
stone came all the truck." It that an eyewitness, and
we see no reason why the trial judge was not justified in
believing this testimony, the plaintiff was entitled to
recover.

Defendant's driver testified that the truck was
driving north in Hillcrest Avenue on the east side of the
street and he made a right turn to pass the defendant
truck on the west side of the intersection, rounding the
corner at a great rate of speed" that the north rear tire
came off the truck. On cross-examination this witness said he did
not observe his truck before the collision occurred. Then
he said, "I pulled it over to the left when I saw his coming."
It this was the way the accident happened, in one opinion
the coach would have been greatly damaged by the impact. The
testimony was intended that when the coach was brought in for
repairs "it did not necessarily give evidence of a very
serious impact."

The opinion witnesses testified for the defendant.
One was the driver of another truck belonging to the defend-
ant which was following the truck involved in the accident,
in Adams street, about 80 miles an hour. He testified the
plaintiff's truck was driving a car west

Hudson coach passed him about a block away from the intersection where the collision occurred, and it was then going about 30 miles an hour. As to whether it slowed up he did not say. He testified that as the truck passed over the intersection, he was about 30 feet away and the Hudson coach "was pretty near on top of it." He added, "when the automobile hit the truck, the truck was on the northwest side of Kilbourn avenue."

The defendant has called our attention to a number of cases announcing the law applicable to intersection collisions. Those cases, in our opinion, state the law correctly as applied to the facts there presented. The trial court in the case at bar apparently believed the testimony submitted in behalf of the plaintiff. We cannot say from the record that the court was not justified in doing so. In some respects the testimony of the defendant's witnesses corroborated the testimony of the driver of the Hudson coach. The cases relied upon by the defendant have no application to the situation presented by the evidence submitted in plaintiff's behalf in this case.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. CONCURS;
O'CONNOR, J. DISSENTS.

O'CONNOR, P. Plaintiff.
TAYLOR, E.T. CONSTABLE.

"GENERAL VERDICT."

in writing.

The Judgment of the Municipal Court of Chicago

mitted in plaintiff's behalf in this case.

No explanation to the situation presented by the evidence sup-
Hudson county. The cases relied upon by the defendant here
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The defendant has called our attention to a
side of Elkhart avenue,

automobile hit the truck, the truck was on the westbound
enough "was pretty near on top of it." He added, "when the
intersection" he was about 50 feet away and the Hudson
not say. He testified that as the truck passed over the
about 30 miles an hour. As to whether it slowed up he did
section where the collision occurred" and it was then going
Hudson auto passed his about a block away from the inter-

105 - 30933

JOSEPH KLAFTER

Appellee,

v.

NASIB BAHOUT,

Appellant.

243 I.A. 608

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Klafter, an architect, brought this action against the defendant, Bahout, to recover the reasonable charges for services rendered the defendant, in the drawing of plans for a garage. The issues were submitted to the court without a jury. The court made a finding for the plaintiff, assessing his damages at the sum of $300.00 and entered judgment against the defendant for that account. From that judgment the defendant has perfected this appeal.

The only point urged by the defendant in support of his appeal is that the finding and judgment are against the manifest weight of the evidence. The testimony submitted by the respective parties is in conflict. That the parties met in October, 1923, and that the defendant then engaged the plaintiff to prepare plans for the erection of a garage, is admitted.

The defendant managed some property belonging to his wife. It was located at 3756-3758 Ogden Avenue, Chicago. The building on the premises at 3756 Ogden Avenue

2413I.A. 508

was a flat building. Apparently the building in question was to be erected on the premises at 3758 Ogden Avenue. One Shapiro, a contractor, who was a friend of the defendant, suggested the plaintiff as an architect to prepare the plans for the garage, which the defendant wanted to build.

The plaintiff testified that he talked with the defendant, in Shapiro's presence, and that the defendant told him he had a frame garage on his premises and he wanted to tear that down and put up a new building; that they discussed what such a building would cost; and the defendant directed him to proceed with the preparation of the plans; that he drew a rough sketch of the floor plan and elevation and showed them to the defendant, who suggested a few changes; that he then prepared plans and working drawings from which several sets of blue prints were made, three or four copies of which were sent over to the defendant about two weeks later; that about a month after that the defendant came to his office and wanted some estimates of cost and "I told him that we wasn't supposed to get him any estimates, all I was supposed to make was the plans;" that the architect is supposed to prepare specifications if the owner wants them but "he didn't want specifications:" that the garage was never built, - he called up the defendant a number of times to see why he did not go ahead with his building, his intention being to send the defendant a bill for his services when the building was put up, and the defendant said he was not ready to go ahead with it, - he did not know whether he could finance it - and finally, in the spring of 1923, not being willing to wait longer, he demanded the money due him. He testified the usual and customary charge for the preparation of such

plans was two per cent of the estimated cost and that the building would cost approximately $15,000.00.

The defendant testified, on the other hand, that he engaged the plaintiff not only to prepare the plans but to procure bids, secure a contractor to do the work and procure a building permit; that he told the plaintiff he had a tenant ready to lease the garage, who wanted possession in 90 days, and told him, "if you can't do that, don't start;" that he reminded the plaintiff that there was "a park right there at the corner, and there is a some kind of an ordinance against it," and the plaintiff assured him he had influence at the City Hall, - "don't you be afraid. I will make the plans and see that you get a permit." The defendant further said that the plaintiff showed him some sketches two or three weeks later, and he called the plaintiff's attention to the fact that they were marked "sales-room," and he said he wanted a garage - not a sales-room, and plaintiff explained that if he applied to the building department for a permit to build a garage, they would be turned down but if he called it a sales-room he could get the permit and "then apply for a garage later on," and he told the plaintiff he did not like that way of doing business - "then I left it to him." The defendant said the first time he ever saw any plans for the building was in April,1923, when they were brought to his office by a young man. The employee of plaintiff was indicated to the defendant in the court room but he said he had never seen him before. The defendant said he rejected the plans which were sent to him in April, 1923.

One Munger, testifying for the defendant, said he was in the garage business; that he agreed to lease this garage which was to be erected by the defendant; that he was present at the defendant's place of business in October, 1933, when the latter talked with the plaintiff, who, he was told, was to prepare the plans for the garage; that at that time he heard the plaintiff say he could go ahead and get the frontage consents himself - "his influence in the City Hall would overcome any of those obstacles there," - that he, the witness, knew about the frontage consents and "called that to the attention of Mr. Klafter;" that the plaintiff said he would have the garage finished in 90 days. On cross examination this witness said he had known the defendant all his life.

One Oliverio, a real estate man, testified for the defendant. He said he was present in the defendant's place of business in October, 1933, when the parties had their talk about plans for this garage, and that Shapiro, Munger and he were present; that he was there "to make up the lease;" that some objection about getting a permit was mentioned, but plaintiff assured them he would have the garage ready in 90 days.

In rebuttal, the plaintiff testified that neither Munger nor Oliverio were present at his conference with the defendant, - that he had never seen either of them before in his life; that the only other person present was Shapiro,- "the contractor, the one who was to build the building according to the plans prepared." The defendant testified he never engaged Shapiro to build the building and that he had nothing to do with it. Shapiro did not appear and testify.

Musil, a draftsman employed by the plaintiff, testified he delivered several sets of blue prints for this garage to the defendant at his office, in October, 1922, and that the defendant looked them over and remarked that they looked all right to him. He also said he never delivered any blue prints to the defendant in the spring of 1923. This was the witness the defendant had previously testified he had never seen before. After Musil testified, the defendant was recalled in his own behalf, and said that when Musil took the stand he recognized him, - that he was the one who delivered the plans to him in April, 1923.

The defendant contends that apparently the reason why the plaintiff did not proceed with the erection of the garage, for which work he was engaged, was his inability to secure a permit. In that connection the defendant, while testifying in his own behalf, said that the building adjoining his flat building, "was a summer garden, - it is not a garage and has never been used as one." His witness, Oliveric, corroborated that testimony, saying, "I have seen the building that was on the premises at that time. I could'nt call it a garage; it was half frame and half brick and half of it is open at the back. I think yeara ago they used it for a garden of some kind. They were not using it for a garage prior to that time that I knew of. I am positive I never saw any cars in there." But the defendant himself testified to the contrary when he was called to the stand at the opening of the trial, under section 33. He then testified : "At 2738 was a wooden building that had been used as a garage, but was condemned."

Monty, a costumes consigned to the wilderness,

The plaintiff testified nothing was ever said about having the garage finished in 90 days, nor about it being in conflict with any ordinance, - "the existing garage was there," in which circumstances "there is no requirement for frontage consents," - "that was never discussed." He also testified, "I wasn't to do anything about getting a permit."

The bare statement of the evidence submitted by the respective parties, demonstrates that it is in hopeless conflict. The trial judge, who saw the witnesses, and observed them while testifying, was in a much better position to judge their credibility than we can be, from a reading of the testimony as it appears in the record. It would be quite impossible for this court to say that the finding and judgment of thetrial court were against the manifest weight of the evidence. The judgment is, therefore, affirmed.

JUDGMENT AFFIRMED.

Taylor, P. J. and O'Connor, J.
concur.

114-30932

243 I.A. 609

THOMAS P. EVANS,

APPELLEE,

vs.

SHARP & SMITH, a Corporation,

APPELLANT.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Evans, a carpenter contractor, brought this action against the defendant, Sharp & Smith, dealers in surgical and hospital supplies, to recover a balance he claimed due for services rendered in removing a lot of partitions, shelves and other fixtures, from defendant's former place of business on Michigan Avenue, in the City of Chicago, and installing them in its present place of business on Lake Street, and its factory on Clinton street.

The plaintiff filed a declaration consisting of the common counts, the ad damnum being $8,000. Later, a bill of particulars was filed setting up a written contract and also giving the amount of labor and material involved, alleging that plaintiff was to be paid "in accordance with the usage and custom in the City of Chicago." It further set up material and labor involved in work done in addition to that originally contemplated, for which plaintiff stated he was to be paid on the basis of fair cash value. The defendant filed a plea of the general issue, together with

2423 I.A. 809

a plea which was designated a plea of set-off setting up payments to the extent of $4,000 and alleging that plaintiff failed to perform all the work he agreed to do. The issues were submitted to a jury and a verdict was returned finding the issues for the plaintiff and assessing his damages at the sum of $4013.25. The court entered judgment against the defendant for that amount, from which the defendant has perfected this appeal.

The defendant contends that the verdict and judgment are against the manifest weight of the evidence,- that the evidence fails to show that any contract was entered into between the parties, and that there was not sufficient evidence to support plaintiff's claim on the basis of a quantum meruit.

It appears from the record that it became necessary for the defendant to vacate the building it was occupying on Michigan Avenue because of the effect of improvements that were being put through along that street under condemnation proceedings. The defendant admits that it sent for the plaintiff in connection with work which thus became necessary, but the parties differ as to what took place between them. One Sharp, of the defendant corporation, with whom plaintiff's conversation was had, testified he told him to go over and see their attorney "in regard to estimates on this work," and that later he asked the plaintiff if he could give him an idea of the cost, and he said he could not, whereupon Sharp said he would give plaintiff the job of taking out the fixtures and installing them in a new location, "and I will pay you five per cent plus, or ten per cent plus;" that plaintiff said he had no money and Sharp replied he would pay him weekly, "so you can pay for your material and your

help." This testimony is not consistent with that of defendant's attorney Barr, which was to the effect that when the plaintiff came to him at Sharp's direction, "to talk about the estimate to be used in connection with the settling of the damage to Sharp & Smith for moving," it not only did not appear that the plaintiff could not give him any idea of the cost, as Sharp testified the plaintiff told him, but Barr said Evans, the plaintiff, told him he had done the same kind of work "at least once or twice before for Mr. Sharp," and that he knew what was wanted, and further, that a few days later Evans submitted his figure in writing, and that this statement had been turned over by Barr to the attorneys for the owners of the building which defendant occupied, and was used by them in reaching an adjustment with the city, as to the damages to be paid in connection with the pending condemnation proceedings. The statement which Evans submitted to Barr at that time was introduced in evidence. It read as follows:

> "I propose to furnish all labor to take down all shelving, balconies, office partitions and basement, now at 155-57 No. Michigan Avenue, and install same anywhere inside of the Loop, for the sum of Seven Thousand Two Hundred and Sixty-five Dollars ($7265.00).
> Respy. Submitted
> T. P. Evans."

The testimony of the plaintiff on the question of his contract with the defendant was to the effect that when Sharp sent for him and he went to the defendant's place of business, Sharp told him they had to move again and asked him to give defendant "an estimate as soon as possible;" that plaintiff "estimated the job on each of the seven floors and basement separately," putting his figures in his book which he showed Sharp, and that this estimate amounted to $7,265.00. The plaintiff testified that Sharp then told him to go and see

their attorney, Barr, and the latter asked him "to submit the estimate in writing because Barr would have to submit it to the Local Board of Improvements with the other bids;" that the witness then put his estimate in writing and delivered it to Barr, keeping a copy himself, which was admitted in evidence as the original. This occurred in February, 1918. The plaintiff testified he saw Sharp frequently after that but Sharp said the moving would not be done until defendant had received its money from the City, and the first week in May Sharp sent for him again saying he had his money and wanted to go ahead with the moving, asking the plaintiff how soon he could do it, and it was then agreed the plaintiff was to put his men to work on the following Thursday, which was done.

The so-called "estimate" submitted by the plaintiff was in substance and in form, a definite proposal to do the work contemplated, at a definite stated figure. The plaintiff's evidence was such as would warrant the jury in concluding that this proposal was accepted when plaintiff was directed to proceed with the work, and did so.

The plaintiff testified further that on the Saturday following the beginning of the work, Sharp asked him to put more carpenters on the job, "to get a floor in shape to open Monday," and plaintiff went to Union headquarters and procured 18 more men to work Saturday afternoon and Sunday, and he told Sharp he had not figured over-time work on the job, and Sharp told him to "go ahead, - keep track of the extras." We find corroboration of this in Sharp's testimony, to the effect that he "was very anxious for the men to go to work, so we could start business Monday morning in the new place." Plaintiff

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further testified that the new quarters rented by the defendant on Lake Street were narrower than those being vacated and this necessitated considerable remodeling of the fixtures, which he told Sharp he had not figured on, and Sharp said, "Keep track of it and I will pay you extra."

The plaintiff testified to extra items of material, labor, and overhead totalling $749.75, which, with the original figure submitted, - $7265.00, - brought the total to $8014.75. He admitted receiving payments to the extent of $4,000. That left a balance of $4014.75, which was one dollar more than the verdict returned by the jury.

Defendant has called our attention to several matters which, it is contended, corroborate Sharp's statement on the question of the agreement between the parties. They are; (1) Sharp paid the plaintiff from time to time; (2) when the work was completed, as plaintiff claims, or he was discharged, as defendant claims, he did not ask for any money or make any claim for a balance for several months; (3) he kept an itemized account covering labor and material on this job, according to his testimony, which would be quite unnecessary if he had a contract for a definite figure; and (4) the defendant submitted the testimony of another contractor to the effect that a fair price for removing and installing the fixtures at defendant's new location on Lake Street, would be not to exceed $3,000. As to these matters, it appears from the record that the defendant did not pay plaintiff "weekly" as Sharp claims he agreed to. We do not consider the fact that the plaintiff made no claim for further compensation, from September, after which no work was done, till the following January, as of any significance.

plaintiff said he kept his itemized account for the purpose of paying off his help from week to week. We agree with the contention of the defendant, that much of the detail which was introduced in evidence, as to the number of men employed by the plaintiff and the hours of labor put in, was quite immaterial, but we fail to see that it did the defendant any harm. As to the testimony of the other contractor, it appears there were a number of elements he did not take into consideration, one of which was the fixtures removed from defendant's former location on Michigan Avenue, to its factory on Clinton street, which were also involved in plaintiff's contract.

In the conflicting state of the evidence in this record, we fail to see how this court would be justified in disturbing the judgment. There is sufficient testimony for the plaintiff, to support the verdict in his favor. The jury apparently believed that testimony. We cannot say they were not warranted in doing so, and in disregarding the testimony which was submitted to the contrary.

It is contended the trial court erred in admitting in evidence, a book in which the plaintiff kept an account of the items he claimed were involved in this job. In our opinion the trial court did not err in admitting it, although the record it contained was in pencil and the leaves of the book on which the items of the Sharp & Smith account were written, had become detached. The pages contained some figures which the plaintiff had only recently written down, but these were **feetings** of the figures which made up the record itself, and the latter, the plaintiff testified he had recorded each Saturday covering the current week, and they were

recorded when the plaintiff made up his pay roll. He testified further that the entries gave the amount of labor employed on this work for the defendant and that they were correct. At another point the plaintiff testified that when the items were written in the book, the leaves on which they were made were bound as a part of the book and that "the entries were made at the time of the work." - that this was "a record of the men and material employed, in his own handwriting."

Apparently one sheet or page contained the record of labor used in the original contract and another contained that of the extra charges involved. The plaintiff further testified that he kept no other payroll than the book introduced in evidence, and that he paid his men by this book. The only part of the record which was material, in our opinion, was that referring to the extra work. But it was competent to that extent as a book of account. The defendant contends that it was used merely as a memorandum of the past recollection of the witness. Even in that case, it was not improper to receive it in evidence, in behalf of the party using it. Koch v. Pearson, 219 Ill. App. 468; Drexel Storage & Transfer Co. v. Hotel La Salle Co., 222 Ill. App. 642. In contending the contrary, defendant cites the case of Juillard v. Friedman, 174 Ill. App. 259. The memorandum involved in that case was not a memorandum of past recollection. It was one made after the transaction involved had taken place.

Our attention has been called to the testimony of Sharp to the effect that when the plaintiff left the work, at his direction, he told him to send him a bill, if anything was due him, in reply to which Evans said, "I cannot do it, I have not got any books." It is pointed out this testimon

was not denied. The evidence shows the book introduced in evidence was lost for a considerable period of time. The plaintiff testified he had a talk with defendant's lawyer about the payment of his account and when he went to make up a statement at the lawyer's request, he looked for this book but could not find it. He testified he found it later "on the top of the desk between the pigeon-holes and curtain," and that it was in the same condition when he found it as it was at the time he produced it in court. Counsel for the defendant rather ridicule this "convenient discovery" of the book, in their brief filed in this court. That was a feature of the plaintiff's case for the jury to weigh and consider. They presumably believed the plaintiff was telling the truth. We find nothing in the record, which, in our opinion, would warrant this court in deciding that they were not justified in doing so.

For the reasons we have given, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

ANTON FUERST and MILES FUERST, co-partners, doing business as ANTON FUERST & CO.,

Appellees,

v.

FRANK KLIKA,

Appellant.

243 I.A. 609

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff partners brought this action against the defendant Klika, to recover a commission they claimed was due them as real estate brokers, for services in bringing about the sale of a piece of property belonging to the defendant. They claimed the sale of the property, which had been consummated, was the result of the services of their salesman, one Sasek. The purchaser of the property was one Posluszny. It is the position of the defendant that the sale was not brought about by the efforts of Sasek, but of another real estate broker, whose name was Basta. After the sale was made, the defendant paid a commission of $870.00 to Basta. Sasek had made known his claim to the commission, and the evidence shows that Basta gave the defendant a bond to secure him against any loss he might suffer by reason of paying the commission to him. The issues were submitted to a jury, and the verdict returned found the issues for the plaintiffs and assessed their damages at the sum of $870.00, which was the amount the plaintiffs claimed, - being the usual percentage of the selling price. To reverse that judgment the defendant

Appellant.

THE KING,

Respondent.

Claim filed Oct. 13, 1898.

H. Morris CHADWICK delivered the opinion of the court.

The plaintiff purports through this petition against the defendant Crown, to recover a commission duly claimed due them on real estate brokerage, for negotiating in bringing about the sale of a piece of property belonging to the defendant. They claimed the sale of the property, which has been consummated, was the result of the services of their employees, one Brooks. The contention of the defendant was one Negligently. It is the position of the defendant that the sale was not brought about by the efforts of Brooks, but of another real estate broker, whose name was Boyle. After the sale was made, the defendant paid a commission of $250.00 to Boyle. Brooks had made known his claim to the defendant, but the claimant was paid Boyle for the defendant a week or so before his sale was made. The claimant could not show that Boyle was entitled to a fee, but the verdict returned found that the plaintiffs had been employed by the defendant for the sale of property, which was the result of their efforts, and that the plaintiffs were entitled to a fee, and the verdict was for $250., and the verdict returned found that the plaintiffs had been employed by the defendant for the sale of property, which was the result of their efforts, and that the plaintiffs were entitled to a fee, and the verdict was for $250., and the verdict

has perfected this appeal.

To entitle the plaintiffs to the commission claimed by them, the burden was upon them to show that they were the efficient, procuring cause of the purchase of the property by Pesluesny. The defendant contends the trial court erred in denying his motion for a directed verdict at the close of the evidence. In our opinion, that contention is not tenable. The testimony submitted in the plaintiffs' behalf was sufficient, in all the elements essential to their case, to take the case to the jury. On that question, we may not weigh conflicting evidence. But the defendant makes a further contention that the verdict and judgment are against the manifest weight of the evidence. On that question, contrary to the contention of counsel for the plaintiffs, we are obliged to consider the matter, of the weight of the testimony submitted in behalf of the respective parties, but we are not concerned with the matter of the mere preponderance of the evidence, but the question presented here is whether, in the opinion of this court, the weight of the evidence is manifestly and clearly against the finding of the jury and the judgment of the trial court.

On the question of whether the plaintiffs were the procuring cause of the sale of the defendant's property, the only witness in their behalf was their salesman Sasek. The substance of his testimony was that he first talked with the defendant about the sale of his property early in 1933. The property in question was a store with a five room flat above. At that conversation, Sasek testified, the defendant asked him to see if he could find a purchaser for this

piece of property, and Sasek secured the detailed information about the property and agreed to see what he could do. The defendant's price was $28,000. There was a $9,000 mortgage on the property and the defendant told Sasek the purchaser would have to be in a position to make a cash payment of $9,000 or $10,000. Sasek further testified that Poslusny was looking for a suitable piece of property in this locality, and he asked Sasek if he knew of anything available there, and he took him over and showed him the defendant's property, from the outside; that Poslusny said he could not handle it himself but he was "figuring on a syndicate" to take it; that he (Sasek) told the defendant he had Poslusny interested; that this was in April or May, 1933, and in June Poslusny told him that those he had in mind as a syndicate had not reached a conclusion and he, personally, did not have enough cash to make the purchase;; that he urged Poslusny to see what he could do to raise enough cash and Poslusny said he would try, and let him know later; that the latter part of June he saw the defendant and told him Poslusny was still interested in the property and was trying to raise enough cash to make the purchase and he (the witness) thought Poslusny would succeed in doing so. Sasek further testified that Poslusny called him up in the latter part of August or first part of September, and he took him over and showed him through the inside of the building, at which time the defendant and his wife were present, and Poslusny was pleased with the property. Again, about the middle of October, Sasek said, he took Poslusny over to see the defendant and "they talked matters over *** and he said he is satisfied with the terms;" that the defendant told

Posluszny about the terms of the first mortgage "and that he will see that the second mortgage is arranged for" and that Posluszny said "it was too late, the banks were closed," and directed Sasek to come to his office the next morning at which time he would give him a check for $1,000 toward the purchase, and they could draw up the contract. Sasek testified further that he was at Posluszny's office the following morning as agreed, at which time Posluszny "stuttered and got red" and told him he was sorry "but he made the contract in Mr. Basta's office last night."

The substance of the defendant's testimony was to the effect that a number of real estate brokers had inquired of him about the sale of his property and he told them all he would sell if he got his price, which was $39,000; and that Sasek was one of these and his first conversation with him about the sale of the property was late in the year 1932. At that time, the defendant said he wanted $35,000 for the property, but in March, 1933, Sasek again talked with him and he then told him his price was $39,000. About a week later Sasek returned and told the defendant he had a prospect but he thought there was "nothing doing now." The defendant further testified that he next saw Sasek the following fall when he came and asked the defendant if his property was still for sale, and he told him it was and the price was the same; that Sasek said he was going to show the property to the same prospect he had been working on the previous spring, and the defendant told him he had "better get a hustle on," and there were others after the property and "I think it will be gone in a day or two." The defendant said the next time he saw

Sasek was after Basta had come in bringing the $1,000 deposit Poslusny had given him, and the contract for the defendant to sign. The defendant said Sasek had never brought "Mr. and Mrs. Poslusny" into his place and shown them the property and he denied there had ever been any such conversation as Sasek testified to, in his store. The defendant's testimony further was to the effect that Basta came to him the latter part of October or the first part of November, telling him he had a prospect and " he wanted to get the terms," and he gave them to him and he said he would be back in a day or two; that he did return in a few days and they again discussed the terms, the defendant telling him he wanted $15,000 cash, but he told Basta, "I will tell you if you get a good responsible man that I know is of good character *** that I could be sure of getting my money, I will take back a second (mortgage) on this property, - so we arranged it that way." The defendant said that the first time he knew Poslusny was the buyer, Basta was working on, was when "the contract had already been drawn up," and presented to the defendant for his signature and Basta came in with Poslusny's check for $1,000.

Basta and Poslusny both testified for the defendant Basta said he submitted the defendant's property to Poslusny in March, 1923, and the next time he talked with him was in October or November., He also testified about his conversation with the defendant in which the latter said he could clear off the first mortgage, which had some time to run, but it would cost him six month's interest to do it, and so he, (the defendant) said, "if it is a good man" he would rath

take a second mortgage from him than "pay that bonus," and Basta replied, "It is a good man buying," and that the next thing that happened was, he took the contract and Poslusny's check to the defendant, and "that's the first time I told him who the purchaser was."

Poslusny testified he had told several real estate men he was in the market to buy a piece of property in this locality, and he first heard of the defendant's property through Basta in 1923, when Basta was the cashier of a bank in that neighborhood. It seems Basta left the bank in June 1923, and went into the real estate business. He said Sasek submitted this property to him in March 1923, and he told him he had heard about that property previously; that Sasek gave him a price of $25,000 and a few days later Sasek told him the defendant's price was $31,000, and the best they could do in the way of a mortgage was $14,000 or $15,000, and he replied that he could not buy on those terms, and he did not see Sasek during the next six months. Poslusny said he saw Basta about June or July, 1923, and again in September when Basta told him the defendant wanted $29,000 for his property and he told him to see if he could get it for a little less; that about this time he called up Sasek and asked him "if he had anything for sale" which was "more reasonable" even if it "was a little farther away, as I felt this was a little too high priced," and Sasek said he would let him know; that sometime in November Sasek came back and told him the only property he had anywhere within a half mile, was the defendant's and that "I would have to have $15,000 in cash to do the deal;" and if he did not buy it, he (Sasek) had another prospect who would. Poslusny testified

further that he then called up Basta and told him if he would guarantee he could get a mortgage of $19,000 on the property, he would take it, and Basta said he would; so he closed the deal through him. Poslusny said he never visited the property with Sasek and never examined the inside of it before he bought it.

If the jury believed Sasek's testimony and disbelieved that of the defendant and his witnesses, they were justified in finding as they did. The element of the number of the witnesses is not the only one involved in the preponderance of evidence. Sasek was a disinterested witness, as he was no longer connected with the plaintiffs when this case was tried. Basta, as well as the defendant, were interested witnesses, as will appear from what we have already said. There were several rather strange circumstances in the account given by the defendant and his witnesses. One does not usually put $20,000 into a piece of property, without seeing the inside of it, when he is in the circumstances in which the evidence shows Poslusny was. Another element in their testimony which may have influenced the jury was that the defendant was willing to take a second mortgage if Basta got him a purchaser who was "a good responsible man, that I know is of good character so I could be sure of getting my money" and yet, according to the defendant and Basta, the latter went ahead and closed his deal with Poslusny and accepted his deposit of $1,000, without saying anything as to who his prospect was, except to remark, "it is a good man buying it."

After a careful consideration of all the evidence, we have concluded that we cannot say that its weight is manifestly against the finding of the jury and the judgment appealed from.

The defendant offered his wife as a witness to testify that she was never present when Sasek brought Pesluany to see his property, as Sasek had testified he did, and it is now contended the trial court erred in sustaining plaintiff's objection to her testimony. In our opinion, she was not a competent witness, under the provisions of our statute, and the trial court did not err in this ruling.

For the reasons we have given, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

Taylor, P.J. and O'Connor, J. concur.

30976

189 - 30978

DAN BALDINO, doing business as DAN BALDINO & COMPANY,

Appellee

v.

JACOB BASS,

Appellant

243 I.A. 609

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Baldino brought this action to recover a real estate commission of $1650.00, which he claimed was due him from the defendant Bass, in payment for services rendered in bringing about the sale of certain real estate belonging to the defendant, for a price of $55,000. The issues were submitted to a jury resulting in a verdict in favor of the plaintiff and against the defendant for the amount sued for. To reverse that judgment, the defendant has perfected this appeal.

The connection of the plaintiff with this transaction was through one Girard, a real estate broker in the plaintiff's employ. The purchaser of defendant's property was one Ariani, who operated a bank known as the First Italian State Bank. He made the purchase through a clerk employed in the bank, whose name was Foresta.

In his statement of claim, the plaintiff alleged he had been directed by the defendant to find a purchaser for his property at a price of $60,000, "or some reasonable sum approximating that amount;" that the plaintiff procured Ariani as a purchaser, who was ready, willing and able to buy

"at the stipulated price of $55,000;"that Ariani requested that the deed be made out in the maiden name of his wife, Felicia Foresta; that subsequently the defendant conveyed the premises by warranty deed to the said Felicia Foresta, and on the same day the latter conveyed the premises by quit claim deed to "Ariani, her husband," by reason of which, plaintiff became entitled to a commission of three per cent of the sale price for his services.

By his affidavit of merits, the defendant denied that plaintiff was in any way instrumental in negotiating the sale of this property or that he had sold or conveyed his property to Ariani, but that he had conveyed it to Felice Foresta at the price of $53,500, and that one Turek was the broker who negotiated the sale; and that he, the defendant, had never met a woman named Felicia Foresta but he believed the person named Foresta, who had purchased the property, was a man.

The defendant, called as a witness by the plaintiff under section 23, testified he had talked with plaintiff's salesman, Girard, about selling the property in question, in January, 1933; that he knew a broker named Turek; that he had been through his building with Ariani and Girard, but not with Ariani and Turek, and that he had sold his property to Felice Foresta for $53,500.

Ariani, called as a witness by the plaintiff, testified that he met the defendant Bass in May 1933, at his property with Girard; that the defendant then asked $58,000 for the property and he made no offer, but told Bass he would let him hear from him later. He said Turek later visited

his office with a proposition for him to buy this property and he visited the property again, the defendant and Turek being present; that he bought the property in December, 1933, sending Felice Foresta, who was a clerk of his, to take title; that he sent Foresta because he "was too busy," that he made his contract with Bass and Turek. This witness testified that he made an offer of $55,500 to the defendant for his property in September and he refused it. He was then asked who was with him when he made that offer and he answered, "the first time Girard, the second time Mr. Turek." He was then asked: "The first time you were with Mr. Girard and Mr. Bass and at that time did you offer $55,500?" He answered, "Yes Sir." Later, on re-direct examination, he said his offer of $55,500 to Bass in September, was in the presence of Turek; that he had not made an offer to Bass previously; that at the time of his meeting with Bass and Girard he did not say anything about $55,500 but he "offered $55,500 to Girard, " in July when Bass was not present. This witness was also asked, "After you met Bass you told him you were buying the building, just before the deal was closed? He answered, "Before; he knew also that I was going to buy."

One Caliguri, an employee of Ariani's, testified that Ariani was the buyer of the defendant's property; that he was present with Ariani and Girard when they were shown through the building by Bass in May, 1933; that he and Ariani went through the building again in September, when Turek and Bass were present.

Foresta was called as a witness by the plaintiff and testified he met the defendant Bass in the presence of Turek; that when he closed the deal he gave Bass a check for

$1,000, signed by Ariani and drawn to the order of the witness; that he went to a lawyer's office to sign the contract of purchase at Ariani's direction; that he "went over to the West Side Auditorium for Ariani to buy him to save his $1500 to $2000."

Girard testified that the defendant asked him to find a purchaser of his property in January, 1933, and the following May he took Ariani to see the property; that Base then asked $60,000 for his property; that he later offered Base $55,000 and still later, $55,500, which Base refused, saying he wanted more than that; that he talked with Base again about the property in November, at which time Base asked him to see if he could get more money for the property, and a little later he learned of the transfer of the property from Base to Foresta and from the latter to Ariani.

The plaintiff introduced in evidence the warranty deed from Base to Foresta and the quit claim deed from the latter to Ariani. The recording stamps on these deeds showed that they had both been recorded on December 5, 1933, at the same hour.

Ariani's lawyer, Bernard Nath, was called as a witness by the defendant. He identified the contract Foresta had executed and the $1,000 check which had been given the defendant as a first payment. On the reverse side of the contract was an unusual paragraph headed, "Addenda," reciting that the contract had been entered into by the seller upon the representation that no broker other than Turek had submitted the property to the purchaser, and that "the above named Charles Turek joins in signing these presents for the purpose of evidencing this representation and accepting the

the commission herein provided, as full compensation to him." This witness testified that he thought the reason Ariani did not want to be known in the purchase of defendant's property was that he seemed to be afraid if defendant knew anyone connected with the First National Bank was attempting to buy the property he would want more money for it. He further testified that he knew Felice Foresta was not buying the property, - that Ariani told the witness the purchase price was $55,500.

The defendant Base testified that he signed the contract to sell his property to Foresta when it was brought to him by Turek and that he deeded his property to Foresta and paid Turek a commission of $700. He said he did not know Foresta when the contract of purchase was brought to him; that he first met Foresta in the office of Nath, the lawyer for Ariani; that he met Ariani the previous April with Girard; that Girard told him he could not get more than $55,500 from Ariani, and Girard said he would drop that deal.

It is the contention of the defendant that the plaintiff did not make out a prima facie case, - that the plaintiff submitted no testimony, showing or tending to show that he had produced a purchaser, ready, willing and able to buy his property on the defendant's terms, and in any case, that the judgment is against the manifest weight of the evidence. As we have already stated, it is clear that the purchaser of this property was, in fact, not Foresta, but Ariani. It seems equally clear that the defendant was willing to and did sell his property for $55,500. Ariani testified he offered that sum to the defendant "around

September or so." The sale to Foresta for that amount, was closed in the first days of December. Ariani gave testimony indicating that before the deal was closed, the defendant knew he was the buyer. The defendant's testimony is to the contrary. The usual commission on that sale, under the testimony, would have been $1665.00. The commission the defendant actually paid Turek was $700. In our opinion, there is sufficient evidence in the record to support the plaintiff's case, and moreover, we do not deem it surprising that the jury returned a verdict finding the issues in his favor. It is true, as counsel for the defendant contend, that fraud will not be assumed but must be proven. It is equally true that it need not necessarily be established by direct evidence but may be shown by circumstantial evidence. Hitton v. Knott, 134 Ill. App. 204. In our opinion the evidence in this case is such as to justify the conclusion that the real reason why this sale was consummated through Foresta, was to save the defendant about $1,000 in commissions. Foresta frankly testified to that effect, - although he saidit was to save Ariani Money, instead of the defendant.

The defendant contends that the trial court erred in refusing to incorporate in its charge to the jury two paragraphs which were submitted by him. The first of these was almost verbatim copy of another which the defendanr submitted and which the court gave. The second read as follows: WHere a broker agreed to accept as his compensation, the surplus or excess over a net price to be realized by the seller, it is upon him to show that the seller received not only the net price, but also an excess, and the amount of such excess." In our opinion, that

paragraph had no application to the evidence in the case, and the court properly refused it. We should say further that this point was not properly saved for consideration here.

The defendant offered in evidence two checks of his, payable to Turek, one for $650 and the other for $50.00, in support of his testimony to the effect that he had paid Turek a commission of $700 for selling this property. The trial court sustained plaintiff's objection to this offer and the defendant contends this was error. We think the checks should have been admitted but we are also of the opinion that the defendant was not prejudiced by the ruling complained of. We think the admission of these checks would be damaging rather than helpful to the defendant, as they would tend to show that by paying Turek a commission of $700 he was trying to avoid a payment of a much larger one to this plaintiff.

No point was made by the defendant in the trial court, nor is it made here, to the effect that the allegations in the statement of claim about Foresta being the wife of Ariani were not borne out by the testimony. In any event, such variance as there was, was immaterial.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

Taylor, P.J. and O'Connor, J. concur.

168 - 30987

DONALSONVILLE GRAIN & ELEVATOR COMPANY, a corporation,

Appellee,

v.

LION SPECIALTY COMPANY, a corporation.

Appellant.

243 I.A. 609

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 13, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Lion Specialty Company, seeks to reverse a judgment for $377.70, recovered by the plaintiff in the Municipal Court of Chicago. By its statement of claim the plaintiff alleged that its claim was for an amount due for goods, wares and merchandise sold and delivered; that the account sued upon, involved one carload of "#1White Spanish Peanuts" at a price of 10½ cents a pound, the car containing 30,816 pounds. The price of the car was $3097.10, and the account showed a credit, by cash, on account, amounting to $2719.40, leaving a balance due amounting to $377.70.

By its affidavit of merits the defendant alleged that the peanuts shipped by the plaintiff, upon inspection on arrival, were found to be not up to standard, and the defendant therefore refused to accept them, and further, that plaintiff, through its agents, notified the defendant that it would allow a reduction in the purchase price to the extent of $377.70, if the defendant would accept the peanuts, and the defendant thereupon paid the amount due,

1871.A. 609

less the reduction allowed, and took the peanuts.

In support of its appeal the defendant contends that under the pleadings the trial court erred in requiring it to proceed with its proof before the plaintiff had made out a prima facie case; and in ruling that the defendant had the burden of proof. In our opinion, the burden of proof was on the plaintiff. There is a material difference between the situation in the case at bar and that presented in "The S. S. Fuel Co. v. John B. Kaucal Coal Co., Illinois Appellate Court, Gen. No. 20733, in which case we are this day filing an opinion. In the case at bar the plaintiff alleged in its statement of claim that the defendant owed it a balance of $377.70, in connection with the purchase of a car load of No. 1 White Spanish Peanuts, consisting of 30, 316 pounds, at a price of 10½ cents per pound. By its affidavit of merits the defendant replied that the sale was a sale subject to inspection, and upon arrival the defendant did not accept the peanuts, but, having made an inspection, advised the plaintiff that it refused to accept them as they were not up to standard; and that thereafter the plaintiff notified the defendant, through its agent, that it would allow a reduction of $377.70 on the purchase price if the defendant would accept the shipment as delivered, whereupon, the defendant paid the purchase price less that reduction, and took the shipment.

On such a state of the pleadings we are of the opinion the burden was on the plaintiff to show that it had delivered the peanuts contracted for, as alleged in the statement of

claim, and that the defendant owed the plaintiff the full amount of the invoice less the payment which the plaintiff acknowledged it had received.

In our opinion, the trial court erred in striking out the testimony submitted in behalf of the defendant, as to the conversation between its president, Cuneo, and the defendant's agent, Roberts. It is true that the testimony submitted as to the extent of the agency of Roberts showed him to be merely the plaintiff's agent to sell peanuts in Chicago, but, in view of the fact that the record shows that the invoice sent in behalf of the plaintiff to the defendant stated that the terms of the sale of the car of peanuts by the plaintiff to the defendant, wer "Net cash sight draft against documents, payable on arrival and inspection," and in view of the fact that the record shows that the bill of lading on this shipment was forwarded to a bank in Chicago, attached to a draft for the full amount of the sale - $3099.10 - but that the defendant took up the draft and procured the bill of lading upon the payment of only $2718.40 - being less than the purchase price by just the amount sued for; and that the defendant thereby procured the bill of lading and means of that document obtained the goods; and in view of the fact that the record further shows that the plaintiff has received this money which the defendant paid the bank, and has credited the amount to the defendant's account, we are of the opinion that the testimony of Cuneo, to the effect that the peanuts did not inspect up to the standard called for by the sale and that he notified Roberts to that effect,

specifying what was wrong with the peanuts; and his further testimony as to his negotiations with this agent, resulting in an acceptance of the defendant's offer to take the shipment at a reduced price, should have been received.

We are further of the opinion that the trial court erred in sustaining the plaintiff's objection to the offer of the telegram from the bank at Donalsonville, Georgia, referring to the matter of the reduction allowed on the draft, which had been sent by the Georgia bank to the First National Bank of Chicago for collection. In advising the defendant that it held a draft drawn upon the defendant for collection, with bill of lading attached, the First National Bank of Chicago was acting pursuant to instructions received from the Georgia bank. When it was shown that the defendant had secured the bill of lading attached to that draft by paying the First National Bank less than the face of that draft, it should have been permitted to show that this was done pursuantto further advice to the First National Bank from the Georgia Bank, as outlined in the offered telegram, which read: "ALLOW REDUCTION OF THREE HUNDRED SEVENTY SEVEN DOLLARS SEVENTY CENTS ON DRAFT DONALSONVILLE GRAIN ELEVATOR ON LION SPECIALTY OF OURS OCTOBER FIRST." Especially is this the case when it appears, as above noted, that after the defendant had taken up this draft and procured the bill of lading, by paying the First National Bank of Chicago the original amount of the draft less the $377.70 specified in this telegram; and that the plaintiff has accepted that payment,

forwarded to it through the banks, and credited it to the account of this defendant. It was shown by the deposition of one Ray, vice president and general manager of the plaintiff company, this deposition being submitted in behalf of the defendant, that, he attached the original bill of lading on this shipment of peanuts consigned to the defendant, to a draft for $3097.14, drawn on the defendant, and deposited that draft in the Planters Bank at Donalsonville, Georgia, with instructions to forward it to Chicago for collection. The telegram which was offered in evidence by the defendant was signed "Planters Bank" and was received by the First National Bank from Donalsonville, Georgia.

The trial of this case was had before the court without a jury. Considering the case on its merits with the rejected evidence received, as it should have been, we are at a loss to appreciate how the plaintiff could possibly claim the amount now sued for, in view of its action in receiving the payment which the defendant made after the negotiations with the plaintiff's admitted agent, and in the light of the advice from the Georgia Bank to the Chicago Bank, as contained in the telegram above referred to.

For the foregoing reasons, the judgment of the Municipal Court of Chicago is reversed with a finding of fact.

Reversed With a Finding of Fact.

FINDING OF FACT:

We find as a fact that upon inspection the goods shipped were not up to the proper quality and that as a result of negotiations then had, the offer of the defendant to take the goods and pay less than the contract price was accepted and the payment made by the

defendant, pursuant to that acceptance, was duly received by the plaintiff, thus confirming the previous negotiations of the parties.

56-30871

243 I.A. 610

ESTHER JOY,
APPELLANT,
vs.
CITY OF CHICAGO, Etc.,
APPELLEE.

APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

Opinion filed Nov. 17, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the plaintiff, Esther Joy, from a judgment in favor of the defendant, the City of Chicago, in a suit of trespass on the case.

The only question that arises here is, whether or not the learned trial judge erred in sustaining the demurrer filed by the defendant to the amended declaration of the plaintiff.

The suit was begun on February 13, 1924; the appearance of the defendant was filed on March 4, 1924, and the amended declaration was filed on June 19, 1925. It contains but one count. It is alleged therein that on October 14, 1923, the City of Chicago was the owner, in possession of, and managing and controlling a certain sidewalk in the City of Chicago, in front of Nos. 6532 and 6534 South Ashland Avenue, and at the time in question "the plaintiff was walking upon and along the said South Ashland Avenue aforesaid, with all due care and caution for the safety of herself and for the safety of others, as she lawfully might do;" and that, at that time, South Ashland Avenue was used as a public highway, and was being used by the plaintiff as such.

Opinion filed Nov. 17, 1938.

It is further alleged "that it became and was the duty of the defendant to keep said sidewalk, at the time and place before mentioned, in a reasonably safe condition for the use of the plaintiff and other pedestrians and the public generally; yet, the plaintiff, though it well knew by its agents and servants, or by the exercise of reasonable diligence, might have known the premises, but not regarding its duty to the plaintiff in that behalf, so carelessly, negligently and improperly kept, maintained, operated and managed the said sidewalk * * * and permitted the same to remain in such disordered and uneven condition, in violation of the statute and ordinances in such case made and provided, that as a direct and proximate result of the premises, and the negligence of the defendant, and without negligence on the part of the plaintiff, while the plaintiff at the time and place aforesaid walked upon said sidewalk, she was, by reason of its lack of evenness, thrown upon and against the said sidewalk" and seriously and severely injured.

It is further alleged "that on, to-wit, January 25, 1934, she served a notice in writing upon the defendant, City of Chicago, in accordance with the statute in such case made and provided."

The defendant, having demurred generally, and, in addition, having assigned as causes for demurrer that the amended declaration did not set out the place of accident with sufficient certainty; that no specific act of negligence is charged; that there is no allegation that the City had notice of the alleged dangerous condition; and that the allegation of statutory notice was wholly insufficient, and the trial judge having sustained the demurrer, and the plaintiff having elected to abide by her amended declaration,

the question arises whether the allegations on the subject of negligence, and of notice, are sufficient.

First. Does the amended declaration sufficiently charge negligence? We think it does. It states (1) that the City owned and controlled the sidewalk in question; (2) that the plaintiff was walking thereon "with all due care and caution for the safety of herself and for the safety of others," (3) that the place in question was a public highway; (4) that it was the duty of the City to keep the sidewalk "in a reasonably safe condition for the use of the plaintiff and other pedestrians, and the public generally;" (5) that the City knew, or by the exercise of reasonable diligence, might have known, the situation or condition of the sidewalk; and (6) that the City, disregarding its duty to the plaintiff, "so carelessly, negligently, and improperly, kept, maintained, operated and managed the sidewalk * * * and permitted the same to remain in such disordered and uneven condition, in violation of the statute and ordinances in such case made and provided, that as a direct and proximate result of the premises, and the negligence of the defendant, and without negligence on the part of the plaintiff, while the plaintiff at the time and place aforesaid walked upon said sidewalk, she was, by reason of its lack of evenness, thrown upon and against the said sidewalk."

It will be observed that the dereliction charged is that the City so carelessly and negligently kept and maintained the sidewalk, "and permitted the same to remain in such a disordered and uneven condition" that the injury to the plaintiff was the direct and proximate result

of the negligent conduct of the City. It is true that the expression is used, "by reason of its lack of evenness," but in making an interpretation of the whole paragraph, we think those words must be taken in conjunction with the words," permitted the same to remain in such disordered and uneven condition."

The argument of the City in support of the demurrer is, that the charge that the sidewalk was uneven was merely a charge that it was not level, and that the City is not bound to maintain sidewalks at the same level, and that, in reality, the only charge is, that the sidewalk by its lack of evenness caused the plaintiff to fall, and, therefore, the allegations failed to make out a charge of negligence. As we have intimated, however, we think the allegations are broader than they are admitted to be by counsel for the defendant, and that the charge, that the sidewalk was negligently permitted to remain in a disordered and uneven condition, though not a statement in detail of the actual physical superficies of the sidewalk, was, nevertheless, a statement of fact sufficiently in detail to inform the defendant concerning the abnormal physical condition it was charged with being responsible for. It will be seen, therefore, that Owens v. Chicago, 163 Ill. App. 196; Healy v. Chicago, 131 Ill. App. 183; Chicago v. Bixby, 34 Ill. 52, and Chicago v. Richardson, 75 Ill. App. 198, cited in support of the City's contention, are not in point. In those cases the derelictions charged as constituting negligence, pertained to the plan or design of the work or improvement, whereas in the instance case, the

dereliction charged does not involve the plan or design of the sidewalk, but pertains only to the physical condition and quality, of the sidewalk, assuming the plan or design to be entirely unobjectionable.

It is further contended that there is no sufficient allegation of due care on the part of the plaintiff. On that subject the declaration contains the following: "That on said October 14, 1923, the plaintiff was walking upon and along the said South Ashland Avenue aforesaid, with all due care and caution for the safety of herself and for the safety of others as she lawfully might do;" and, further, "that as a direct and proximate result of the premises and the negligence of the defendant, and without negligence on the part of the plaintiff, while the plaintiff, at the time and place aforesaid walked upon said sidewalk, she was by reason of its lack of evenness thrown upon and against the said sidewalk, whereby the plaintiff was seriously and severely injured." To allege that she was walking with all due care and caution for the safety of herself and for the safety of others and that the injury was caused by the negligence of the City and without negligence on her part, in our judgment, constitutes an ample and sufficiently full statement of the exercise of due care on the part of the plaintiff.

Second. Was the allegation of statutory notice sufficient? The declaration contains the following: "Plaintiff further avers that on, to-wit: January 25,1924, she served a notice in writing upon the defendant, the City of Chicago, in accordance with the statute in such case made

and provided." It is urged for the City that that allegation does not sufficiently comply with the statute, Section 2, ch. 70 (Cahill's St. 1923, p. 1317), which provides, in regard to suits for injuries against cities, that "any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, * * * either by himself, agent or attorney, file in the office of the city attorney * * * a statement in writing, signed by such person, * * * giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician, if any."

Section 3 (Cahill's St. ch. 70, Sec. 3) provides that if the notice is not filed as required by section 2, "then any such suit brought against any such city shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing."

Although, now, the allegation of notice is an essential element in a declaration stating a cause of action in a suit against the City for damages for personal injuries, there is nothing in the statute as to the form in which such notice shall be pleaded; and the question, therefore, arises, whether the simple allegation that on, to-wit, January 25, 1924, "she served a notice in writing upon the defendant, the City of Chicago, in accordance with the statute in such case made and provided," is sufficient. We think it is. The words in Section 3, "If the

notice provided for by Section 2 of this act shall not be filed" compendiously designates all the elements provided for by Section 2, as constituting a "notice," and we know of no reason why a pleader, in undertaking to allege that the plaintiff had complied with Section 2, may not succinctly allege, as in the instant case, that on a certain date he served a notice in writing upon the defendant, in accordance with the statute in such case made and provided.

There is no doubt that if a verdict had been rendered upon the declaration in this case, notice would be presumed to have been proved and the declaration considered sufficient to support a judgment. Welch v. City of Chicago, 236 Ill. App. 530. In the Welch case this court said, "Because notice now is of the essence of the cause of action, it does not follow that all the many things, which may have gone into producing the ultimate fact of statutory notice, should be recited and described in detail in the declaration." Applying that general principle, we are of the opinion that the allegations in the declaration on the subject of notice are sufficient.

The judgment, therefore, will be reversed and the cause remanded, with directions to overrule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, J. AND THOMSON, J. CONCUR.

153 - 30972

PEOPLE OF THE STATE OF ILLINOIS, EX REL HELEN JOHNSON,

Appellee,

v.

SAM SCOTT,

Appellant.

243 I.A. 610

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Nov. 17, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment of the Municipal Court against the defendant, Sam Scott, in a bastardy case. There was a trial by the court, with a jury, and a verdict that the relatrix, Helen Johnson, on June 2, 1925, was delivered of a male bastard child, born alive, and that the defendant was the father, and judgement was entered upon the verdict, and the defendant was condemned to pay $1100.00 for the support, maintenance and education of the child.

Upon review here, the only contention made and urged as a ground for reversal is that the verdict is clearly against the weight of the evidence. The only witness who testified for the People was the relatrix, Helen Johnson, the mother of the child. Her evidence is substantially as follows:- She was at the time in question a single woman, twenty-five years old, and had never been married. She first met Scott, the defendant, in June 1924, at 4606 Wabash avenue, the home of a Mrs. Dixon, where he was room-

2493 I.A. 610

Opinion filed Nov. 17, 1938.

ing. She, the relatrix, was introduced to him that day, in the evening, by Mrs. Dixon, his landlady. She next saw him on the following day, about 6:30 P.M., at Mrs. Dixon's, when he came from work. He asked her to play cards, but she said she didn't play. She then sat down and watched him and others play, until about ten that night. Her mother lived there on the second floor and her brother on the first. She went up stairs to talk to her mother and when she came out, Scott came out at the back and said he would like to talk to her. She told him she did not have time and would see him later. The next day, about 7 P.M., while sitting on the back porch, Scott, just back from work, came to her and said he would like, sometime, to talk to her. She was writing some letters for her brother, and not having time to talk to him, told him she would see him later. She went to see her mother every day, and, so, saw Scott at various times in June, 1934. On one Sunday in June, after going to church, she saw Scott, about 4 P. M. at Mrs. Dixon's. She was sitting on the back porch, and Scott talked with her, and asked her if she was married. She told him that she was not, and he said he was not, and would like to keep company with her. After that she had various talks with him. He said he wanted to get a girl that was not married, somebody that would treat him right. On one occasion he asked her to call and see him thenext night, and accordingly, she saw him after he came back from work. That evening he asked her to join his church at 43rd and Wabash avenue. They met from time to time in June, July and August. One night in the latter part of August, at Mrs. Dixon's, they went up stairs together, and he told her that he had decided that they would be married some time in November, because he was not married, and she was not, and there was

nothing in the way; that he thought he could make a good husband, because he had a good job, and she had. They talked until 11 P.M. and then he asked her if she could not stay all night with him. She told him she did not like to stay alone especially in the house where her mother was; that he said, the door was closed in the hall and there was nobody saw them come up to the room; that she then took off her clothes and they went to bed. She had intercourse with him, and thereafter, that is, after the latter part of August, saw him almost every night. Her last menstrual period was September 5, 1924, and the child was born June 2, 1925. The child is a boy and is still alive. At the time of his birth she was not married, and was not married at the time of the trial. When she was encsinte, she told him about it, and he said it was all right because they were both single and he would be able to protect her, and they would be married in November. That, later, he asked her if she would like to have the baby or get rid of it. She told him if he would marry her she would not mind. On a Sunday in the early part of November, he told her that he was married, that he was married on October 24 to a Willa May Turner; that he married because he had to; that he already had had a child by the Turner woman, and she was pregnant again. She, the relatrix, saw him again and he said that although he was married, he was willing to take care of the baby. On one occasion he told her that if she did not want the baby he would give her the money and take her to a doctor; and afterwards, through some boy, he sent her $15.00. He was to take her to a doctor at 48th and State street. On May 8, 1925, she caused him to be arrested.

The defendant testified that he was 38 years old, and has two children; that the relatrix was never in his room; that he never went anywhere with her; that he never had intercourse with her; that he never met her at the place he was rooming; that he never had any conversation with her at any time; that he never sent her $10.00, or gave her any money at any time. On cross-examination, he testified that the relatrix roomed in the same building that he did; that she lived downstairs and he lived upstairs; that he met her in September, and would speak to her as they passed; that he met her as a roomer.

Some evidence was introduced in an effort to show that the relatrix at the time in question, was a married woman, but as the relatrix testified that she was never married, we are not justified in holding that the jury was not justified in concluding that she was an unmarried or single woman. La Plant v. The People, 60 Ill. App. 340.

It is urged for the defendant that thereis no evidence that he was the father of the child save the testimony of the complainant, which is contradicted by the defendant himself, and McFarland v. People, 72 Ill. 368, is cited as an authority to the effect that in such a case, the cause of action is not established by a preponderance of the evidence. In that case, however, the court merely held that if the parties or witnesses were of "equal credibility," a preponderance was not established. Here, in the judgment of the jury, they were not equally credible. And that being the situation, are we, from the record as it comes to us, justified in holding that the verdict was manifestly against

the weight of the evidence? We are constrained to answer that question in the negative. The jury having had the great advantage of seeing and hearing the witnesses, and finding, as we do, no substantial discrepancies or inconsistencies in the testimony of the relatrix, we feel bound to allow the verdict and the judgment to stand. La Plant case (Supra); People v. Glees, 239 Ill. App. 56.

The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

31023

204-31023

243 I.A. 610

GUSTAVE C. SPENGLER,
Appellee,
vs.
MAX HERMAN and DORA HERMAN,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 17, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On October 31, 1923, Gustave C. Spengler, the plaintiff, brought suit in the Municipal Court against Max and Dora Herman, defendants, for money loaned, and recovered a judgment, before the court, without a jury, for $4,284.88 and costs. This appeal is therefrom.

The theory of the plaintiff is that for certain money he loaned the defendants they gave him, on September 30, 1922, eleven notes, each for $150.00, due, respectively, one each month thereafter, and one for $3,350.00, due one year after date, all of which were secured by a trust deed on certain real estate; that certain payments were subsequently made thereon; that sometime after the delivery of the notes, negotiations were begun between them whereby the defendants were to assign to him a certain contract and in consideration thereof he was to cancel their debt represented by the notes; that although he cancelled and delivered the notes, they refused to assign the contract, and have failed to pay any further part of the indebtedness.

It is the theory of the defendants that, although

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they admit they executed and delivered the notes in question, the notes were subsequently cancelled as the result of their assigning the contract to the plaintiff.

Spengler, the plaintiff, and the Hermans, the defendants, had known each other for some years, and had had numerous real estate deals, and were on friendly terms. Spengler, on September 30, 1922, had loaned them of his own money $4500.00, which was evidenced by the notes in question. Early in 1923 Spengler, as a real estate agent, had for sale a piece of property known as 5123 North Kimball Avenue. The owner was one Bechtold. On February 10, 1923, at the instigation of Spengler, the Hermans contracted in writing to buy Bechtold's property for $32,340.00, and made a deposit of $500.00 as part of the purchase price. Later, according to the testimony of Max Herman, while the title was being examined, and after he had been told there was a profit in the contract, Spengler offered to cancel the notes he held, if they, the Hermans, would assign the contract to him, and that, accordingly, the notes were cancelled, the contract assigned to Spengler, and the $500.00 deposit returned. Dora Herman testified that Spengler came to her home and told her that he had an offer for the Bechtold property of about $36,000.00, and that if they, the Hermans, assigned the contract to him they would make over $4,000.00; that he would take their contract off their hands, and cancel their notes, which amounted to about $4100.00; that she consented; that he gave her back the check for $500.00, that she assigned the contract, on the back, to Spengler and Everst (Spengler's associate), and gave it to Spengler; that Spengler marked each of the notes

Cancelled and gave them to her; and a few days later her husband, Max Herman, went over to the office of one Levine and got a release of the trust deed.

The evidence of the Hermans as to what took place in regard to the history of the notes and the Bechtold contract is quite different from that given by Spengler and Everet. Spengler testified that on March 13, he had a talk, at his office, with Max Herman; that the latter said he did not care about going through with the Bechtold deal on which a deposit had been made; that he told Herman he would have to see Everet about it; that later Dora Herman called and stated that she wanted to pay off the mortgage; that he told her, all right; that later in the day she called up and wanted to know when he was coming over; that he said he would be over about 9 P. M.; that he went to the Herman's home that night and found her alone; that he asked her if he could mark the notes paid; that she got him a pen and he marked the notes paid, and cancelled, and gave them to her; that about that time, Max Herman jumped out of a clothes closet and grabbed the notes, and threatened his life, said he would kill him; that the next morning Dora Herman telephoned him, and said she did not know her husband was there; that she wanted to meet him, Spengler, and straighten the matter out, and asked him to meet her at Western Avenue and Rosehill Cemetery; that he met her and she said she would take care of the matter, "don't start anything. I will take care of it;" that after that she called him up several times and begged him not to do anything; that she would pay him; that Max Herman called him up and threatened him; that he told Herman that "unless you pay me the money I am going to have you down to the State's Attorney's office."

Everet, a real estate partner of Spengler, testified that Max Herman, on March 12, called at their office and said he did not want to go through with the deal; that Nora Herman called and he gave her back a check for $500.00, and had her assign back the contract of March 12, 1923, as cancelled, at the request of Bechtold; that about the middle of the day he went over to see Bechtold about closing the deal; that the latter said he wanted his signature back; that he knew the Hermans before, and they were pretty intimate with Spengler and he was afraid they were trying to tie up the property; that later Spengler got in touch with Nora Herman and called her over and talked with her; that afterwards, he took the contract to Bechtold; that at that time the signature was off; that Bechtold immediately tore up the contract.

As to the cancelling of the contract, Spengler testified that when Nora Herman called he said to her, "I suppose you came in in regard to this contract, cancelling of the contract," and that she answered, "Yes;" that thereafter Everet took care of the matter, and she signed a cancellation on the back of the contract, and Everet handed her the $500.00 check.

Levine, a lawyer, who was the trustee of the trust deed which secured the notes sued on, testified that on March 15, 1923, Max Herman came to his office with the cancelled notes and he issued a release deed which was recorded on March 23; that at the time, all the notes were marked either "paid," or "cancelled," and were not torn in half.

Bechtold testified that on February 10, 1923,

he entered into a contract with Dora Herman, brought to him by Spengler and Everst, for the sale of the property; that the following day they informed him that the property was sold, and that the consideration was $33,340.00; that some time after signing the contract, he told Spengler he wanted the deal closed and Spengler stated that he would have a new buyer and he would bring a new contract, that the deal was cancelled as far as Mrs. Herman was concerned; that Everst said the Hermans could not go through with it, they did not have the necessary cash, but they, Spengler and Everst, had a new buyer; that Everst came over and brought the old and a new contract; that there was some writing on the back of the old contract; that he did not recall what it was; that he tore up the old contract; that Everst said the new purchaser was an employe of the post office; that the following day, after looking over the new contract, he called up Spengler, and told him he would not make the second deal; that afterwards he sold the property himself. He further testified that shortly before the trial the Hermans talked with him and asked him if he remembered that the contract was assigned to Everst and Spengler in longhand; that they visited him for over an hour; that Mrs. Herman asked him if he could help her out; that he told her he could not recall such a thing.

On the subject of the release, Spengler testified that one reason he did not notify Levine that the notes had not been paid was because Max Herman had threatened his life, that when Levine asked him why he did not call him up and let him know the facts, he told Levine it was because Mrs. Herman called him, Spengler, and said she was going to pay him.

The judgment in such a case as this, where the evidence is, to a large extent, contradictory and irreconcilable, is

necessarily dependent upon whatever credence is given to the testimony of the various witnesses. If Spengler, Everet and Bechtold are to be believed, we think the judgment of the learned trial judge must stand. Are there, as the case is presented here on review, such manifest inconsistencies in their testimony that we are bound, in reason, to say that the judgment is against the manifest weight of the evidence? In answering that question it has to be borne in mind that the trial judge who seen and hears all the parties and the various witnesses, has "vastly superior advantages" for the discovery of the truth, and of falsehood, than we have. Calvert v. Carpenter, 98 Ill. 63. If the contract with Bechtold was not turned over by the Hermans to Spengler in consideration of a cancellation of the debt of the Hermans on the notes, then the debt remained unsatisfied, even though the notes were marked "paid" and "cancelled." In such a case, there is no new contract, no finished, consummated transaction, and the original liability for the debt, evidenced by the notes, still remains.

Counsel for the defendants undertake to point out, and emphasize, some supposedly suspicious and suggestive inconsistencies in the evidence introduced which it is urged tend sufficiently to show that the plaintiff failed to make out a case. There are some discrepancies, but we think, weighing all the evidence, and bearing in mind the credit which the trial judge must be considered as having given to the testimony of the plaintiff and his witnesses, that it would not be reasonable for us to override his judgment.

Some criticism is made of the statement of

necessarily dependent upon whatever credence is given
to the testimony of the various witnesses. It [illegible]
stated and [illegible] me to be believed, as this
the [illegible] of the [illegible] fact must exist.' Ha
there' or the case is [illegible] on [illegible]. [illegible]
manifest inconsistencies in their testimony that we can
[illegible] in person" to ask that the judgment in criminal the
[illegible] weight of the evidence. In measuring that question
it [illegible] to be borne in mind that the trial Judge who saw
and heard all the witnesses testify, can [illegible] appraise
[illegible] manner, as the appellate [illegible] cannot.
"Finally remember that the discovery of the facts,
and [illegible] upon the various witnesses, the
[illegible] 83 Ky. 83. It the contrary with Kentucky was not shared
and of [illegible] upon me [illegible] v. Commonwealth,
[illegible] 83 Ky. 83. It the contrary with Kentucky was not shared
[illegible] the [illegible] to consider in consideration of a com-
[illegible] of the [illegible] on the motion, upon
the [illegible] of the [illegible] even though the notes were
marked "only" and "excluded." In such a case, there is no
[illegible] [illegible] "excluded," even though the notes were
entirely [illegible] for the [illegible] of the
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

claim. It is true that it does not technically and in detail set up what was proved at the trial; but it does allege that the notes were marked paid and cancelled, and delivered back at the request of the defendants, and upon their promise to pay, and that they did not pay. That was ample. Then, too, no question of insufficiency or variance was raised at the trial. Messenger v. Wendell, 311 Ill. App. 374.

Further, the only affirmative defense the defendants set up in their affidavit of merits was that the plaintiff and the defendants negotiated for the purchase of certain real estate, and that "in consideration of certain profits accruing to the plaintiff, he did cancel and deliver to the defendants said notes * * * and that the cancellation of said notes was the profit accruing to the plaintiff on account of the negotiations of said real estate;" whereas the defendants at the trial undertook merely to show that in consideration of the assignment of the contract, the notes were cancelled and the debt paid. The latter became the prevailing issue at the trial, and as there was a fair trial, we do not feel justified in considering the judgment erroneous.

It is contended that as the statement of claim alleged that there was due $4150.00 of principal, together with interest at the rate of 7% per annum, amounting to $182.72, and the judgment was for $4924.68, that it is erroneous. Evidently, the reason why the trial judge entered judgment for the larger amount was because on December 8, 1925, the principal and interest, together,

amounted to $4924.68. As, however, the ad damnum was $5,000.00, and there was actually due at the time of judgment the amount it was entered for, we do not think it was error to give judgment for an amount which included interest that had accrued after the affidavit of merits was filed.

For the foregoing reasons, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

255 - 31075

CHAS. A. STEVENS & BROS.,
Appellee,

v.

W. O. CARR,
Appellant.

243 I.A. 610

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Noc. 17, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On November 20, 1919, the plaintiff, Chas. A. Stevens & Bros., began suit in the Municipal Court against the defendant, W. O. Carr, in a Fourth Class case. The plaintiff's statement of claim, filed on that day, alleges, "its claim is for goods, wares and merchandise sold and delivered by the plaintiff to the defendant at the defendant's special instance and request to the amount of $101.18; * * * that its claim is upon an account stated amounting to $101.18."

On September 28, 1920, the cause came up in its regular course for trial, and the plaintiff being called in open court and failing to appear, the court non-suited the plaintiff, and entered judgment for costs in favor of the defendant.

On July 22, 1925, almost five years later, on motion of the plaintiff, the order of September 28, 1920, was vacated and set aside, and the cause reinstated.

On July 29, 1925, summons was issued against the defendant, W. O. Carr, and served on him on August 4, 1925.

2431.A. 610

Opinion filed Nov. 17, 1926.

On August 7, 1925, the defendant entered his appearance "for the sole and only purpose of moving to quash the summons and denying jurisdiction of the court."

On August 10, 1925, an order was entered, which is, in part, as follows:

> "On motion of the plaintiff herein, the defendant W. O. Carr, is ruled to appear instanter, and thereupon said defendant being called in open Court, comes not, nor does any one for said defendant, but herein said defendant makes default, and it appearing to the court that said defendant was duly notified by being personally served with process according to law duly notified said defendant of the pendency of this suit and of the time required of said defendant to appear herein, all of which was sufficient number of days prior to the time required of said defendant to appear as aforesaid to now require of said defendant, that said defendant either appear in this cause at this time or that said defendant suffer judgment by default for want of such appearance, and it further appearing to the Court that said defendant is still in default of an appearance herein, it is, on motion of the plaintiff, ordered by the Court that default be entered herein against said defendant for want of an appearance."

That order, also, set forth that the court heard evidence as to the plaintiff's damages, and assessed them at $101.18, and entered judgment for that amount against the defendant.

On August 27, 1925, on motion of the defendant, the order of August 10, 1925, was vacated and set aside, and the service of summons quashed.

On August 31, 1925, a motion on behalf of the plaintiff that the order of August 27, 1925, be vacated and set aside, was entered, and set for hearing September 22, 1925.

On October 9, 1925, on motion of the plaintiff, the court, (1) vacated and set aside the order of August 27, 1925,

On August 7, 1888, the defendant entered pro

appearance "for the sole and only purpose of moving to

quash the summons and resulting jurisdiction of the court."

On August 10, 1888, an order was entered, which

is, in part, as follows:

"On motion of the plaintiff herein, the defendant
W. G. Carr, is ruled to appear instanter, and thereupon
said defendant being called in open Court, comes not,
but does any one for said defendant, but herein said
defendant makes default, and is appearing to the court
that said defendant was duly notified by being personally
served with process according to law duly notified said
defendant of the pendency of this suit and of the time
required of said defendant to appear herein, all of which
was sufficient number of days prior to the time required
of said defendant to appear as aforesaid in the regular
of said defendant, that said defendant either appears in
this cause at this time or that said defendant suffer
judgment by default for want of such appearance, and it
further appearing to the Court that said defendant is
still in default of an appearance herein, it is on
motion of the plaintiff, ordered by the Court that de-
fault be entered herein against said defendant for want
of an appearance."

That order, also, set forth that the court heard evidence
as to the plaintiff's damages, and assessed them at $1021.10,
and entered judgment for that amount against the defendant.

On August 27, 1888, on motion of the defendant, the
order of August 10, 1888, was vacated and set aside, and the
service of summons quashed.

On August 31, 1888, a motion on behalf of the plain-
tiff that the order of August 27, 1888, be vacated and set
aside, was entered, and set for hearing September 22, 1888.

On October 8, 1888, on motion of the plaintiff, the
court, (1) vacated and set aside the order of August 27, 1888,

(2) vacated and set aside the judgment by default of August 10, 1925, (3) overruled the motion of the defendant to quash the service of summons issued July 29, 1925, (4) on motion of the defendant struck the plaintiff's statement of claim from the files; (5) gave the plaintiff ten days in which to file an amended statement of claim, and (6) ordered that the defendant file an affidavit of merits to the amended statement of claim within ten days thereafter.

On October 14, 1925, the plaintiff filed an amended statement of claim, reciting that the defendant was indebted to it in the sum of $101.18 on an account stated, for the balance of the price of certain merchandise had and received.

On November 5, 1925, the motion of the defendant to strike plaintiff's amended statement of claim was overruled, and the plaintiff was given leave to amend the statement of claim on its face; and it was ordered that the defendant be given leave to file an affidavit of merits instanter.

On the same day, November 5, 1925, the defendant filed an affidavit of merits substantially as follows:

> "That he did not enter into an account stated with said plaintiff and that it appears from said amended statement of claim that said supposed account stated if ever entered into was more than five years prior to filing said amended statement of claim and is therefore barred by the Statute of Limitations. That said court is without jurisdiction of said cause."

On November 27, 1925, the cause came up in its regular course for trial, and the defendant being absent and not represented, and the court having heard evidence and arguments of

counsel, found the issues against the defendant and assessed the plaintiff's damages at $101.18, and entered judgment in favor of the plaintiff and against the defendant.

On December 3, 1925, motions by the defendant for a new trial and in arrest of judgment, were made and overruled.

This appeal is from the judgment entered on November 27, 1925.

We have before us only the common law record. It is the law that when no bill of exceptions is presented, we are entitled to consider only such errors as appear on the face of the common law record. Kalish v. City of Chicago, 319 Ill. 133, 137. Mellers v. Whittier Machine Co., 170 Ill. 434. Helmuth v. Bell, 150 Ill. 263; The people v. Ill. Mchts. Trust Co., 320 Ill. 365; The People v. Glasgow, 301 Ill. 394.

It is contended that it was error for the trial judge, on July 22, 1925, on motion of the plaintiff, to vacate the order of September 28, 1920 and that the plaintiff did not show diligence in procuring service of summons, and that, therefore, the court was entitled to dismiss the suit for want of prosecution but in the view we take of the case that motion was not involved.

It is urged for the plaintiff that the defendant has no right now in this court to question the jurisdiction of the trial court to reinstate and try the case; that as the defendant entered his special appearance for the purpose of questioning the jurisdiction of thecourt, and after the question was decided against him, he appeared generally and moved to strike the plaintiff's statement of claim from the

files, and later filed an affidavit of merits he thereby waived his right to challenge the court's jurisdiction. This court said in Crandall v. Kraetzer, Fischer & Co., 155 Ill. App. 496,

> "Where a case has been dismissed and is subsequently, after the dismissal term, reinstated over the objection of one of the parties, if the objecting party thereafter appears and participates in the proceedings in court, otherwise than by objecting, on the ground of lack of jurisdiction, to such action as may be proposed to be taken by his adversary or by the court, he thereby waives the lack of jurisdiction of his person and confers upon the court jurisdiction of his person as by a voluntary appearance." Zandstra v. Zandstra, 226 Ill. App. 293; Herrington v. McCollum, 73 Ill. 496; Meisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541."

In the instant case, inasmuch as on November 5, 1925, an order was entered that the defendant be given leave to file an affidavit of merits instanter, and pursuant thereto, the defendant filed an affidavit of merits, denying that he entered into an account stated with the plaintiff, and alleging that any account stated he ever entered into occurred more than five years prior to the filing of the amended statement of claim, and was, therefore, barred by the Statute of Limitations, it follows that the defendant was not thereafter in any position to contest the right of the trial judge to take and assume jurisdiction of the issue made by the statement of claim and the affidavit of merits.

The claim that the Statute of Limitations was a bar is not tenable. The defendant was not present, and it must be presumed that, as an appropriate defense, it was not made out.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

finding no error in the record, the judgment will be affirmed.

The claim that the statute of limitations was a bar is not tenable. The defendant was not present, and it must be presumed that, as an appropriate defense, it was not made out.

89 - 30906

R. E. COCHRAN COMPANY, Inc., a corp.,

Appellee,

v.

MARK T. ADAMSON, doing business as MARK T. ADAMSON COMPANY,

Appellant.

243 I.A. 610

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 17, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages claimed to be due on account of the failure of the defendant to divert two cars of lettuce as requested. At the close of the evidence the court instructed the jury to find the issues for the plaintiff, leaving the question of the amount of the damages to the jury. The jury returned a verdict as instructed in favor of the plaintiff and fixed the damages at $1605.00. Judgment was entered on the verdict and the defendant appeals.

There is some confusion in the record but upon a careful consideration of all the evidence we think it appears that defendant owned two carloads of lettuce which were on track in Chicago; that the lettuce was shipped from California and arrived in Chicago on the 14th of April, 1924 and that shortly thereafter there was an inspection by the Federal Government, of the lettuce and the defendant called on the F. O.B. Auction Company, a corporation, which conducted its business on Lake Street in Chicago, and requested it to sell

R. E. DONOVAN COMPANY, Inc.,
a corp.,

Appellee,

v.

ALEX T. ADAMSON, doing business
as ALEX T. ADAMSON & CO.,

Appellant.

APPEAL FROM
2431.A. 610

Opinion filed Nov. 17, 1936.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages claimed to be due on account of the failure of the defendant to divert two cars of lettuce as required. At the close of the evidence the court instructed the jury to find the issues for the plaintiff, leaving the question of the amount of the damages to the jury. The jury returned a verdict as instructed in favor of the plaintiff and fixed the damage at $1808.00. Judgment was entered on the verdict and the defendant appeals.

There is some confusion in the record but upon a careful consideration of all the evidence we think it appears that defendant sold two carloads of lettuce which were on track in Tulare, that the lettuce was shipped from California via Chicago on the 14th of April, 1934 and that shortly thereafter there was an inspection by the federal Government, of the lettuce and the defendant called on the U. S. Auction Company, a corporation, which conducted its business on Lake Street in Chicago, and requested it to sell

the two carloads of lettuce for the defendant. It seems that the lettuce was shipped from California by Pata & Hager to defendant and that the auction company listed the two cars of lettuce in their catalogue under the name of Pata & Hager at defendant's request. On the 16th of April the auction company sold the two carloads of lettuce at public auction to plaintiff, whose business was located in New York City. Plaintiff notified the auction company to have the cars diverted to it at Jersey City, N. J. via the Pennsylvania Railroad Company. On the same day the auction company notified the defendant to divert the cars as requested by plaintiff. The defendant apparently neglected to do this and when the cars did not arrive as expected in Jersey City, plaintiff requested the auction company to trace the cars and upon this being done, it was found that they were still on track in Chicago not having been diverted. Thereupon, on April 22nd, the auction company again notified the defendant to divert the cars to plaintiff which was done and they went forward and while en route one or both of the cars were diverted by plaintiff to Philadelphia, and the market not being satisfactory at that city, they were sent on to New York City at plaintiff's direction, arriving there April 30, 1924. Plaintiff sold the two carloads of lettuce and it claimed that on account of the delay in the forwarding of the cars, it sustained the loss for which it sued.

Plaintiff to sustain its contention offered in evidence what it terms a contract or rules of sale of the auction company. That document is dated April 16, 1924, addressed to the auction company and signed by plaintiff and requests the auction company to divert the two cars to plaintiff via

the Pennsylvania Co., destination Jersey City, N.J. On the back of these two documents, (there being a similar document for each car) appears printed matter which is designated "terms of sale" which consists of a number of paragraphs of which Paragraph 7 is as follows: "The sellers or their respresentatives shall file diversion orders within 24 hours after sale, billing cars as instructed by the F. O. B. Auction Company. Should the seller fail to furnish such diversion instructions within the time specified, the sellers shall be responsible to the F. O.B. Auction Company for all claims arising out of the non-delivery, in accordance with the terms hereof." Plaintiff also offered evidence to the effect that three copies of these terms of sale were posted in three conspicuous places in the auction room where the two cars were sold. This evidence was offered for the purpose of showing that the defendant had notice of the terms under which the lettuce was sold, the contantion being thatthe above paragraph 7 was, therefore, binding upon him, and that when he was notified after the sale on the same date, by the auction company to divert the cars it was his duty to do so. When plaintiff's evidence was introduced to the effect that the three copies of the rules were posted in three conspecious places in the auction room, the court assumed that this made the "terms of sale" or rules binding upon the defendant. There was no other evidence tending to show that the defendant had any knowledge of the rules.

We think it is clear that the defendant owned the two cars of lettuce on track in Chicago and that they were sold for him at his request by the auction company at public auction to the plaintiff. The fact that the auction company's

We think it is clear that the defendant owned the two cans of letters on track in Chicago and that they were sold for its benefit by the Auction company at public auction to the plaintiff. The fact that the Auction Company's

the Pennsylvania Co., destination Jersey City, N.J. On the back of these two documents, (there being a similar document for each car) appears printed matter which is designated "terms of sale" which consists of a number of paragraphs of which Paragraph 7 is as follows: "The sellers or their representatives shall file diversion orders within 24 hours after sale, billing same as instructed by the P. C. R. Auction Company. Should the seller fail to furnish such diversion instructions within the time specified, the sellers shall be responsible to the P. C.R. Auction Company for all claims arising out of the non-delivery, in accordance with the terms hereof." Plaintiff also offered evidence to the effect that three copies of these terms of sale were posted in three conspicuous places in the auction room where the two cans were sold. This evidence was offered for the purpose of showing that the defendant had notice of the terms under which the letters was sold, the contention being that the above paragraph 7 was, therefore, binding upon him, and that when he was notified after the sale on the same date, by the auction company to divert the cars it was his duty to do so. When plaintiff's evidence was introduced to the effect that the three copies of the rules were posted in three conspicuous places in the auction room, the court assumed that this made the "terms of sale" or rules binding upon the defendant. There was no other evidence tending to show that the defendant had any knowledge of the rules.

catalogue indicated that the lettuce belonged to Pata & Hagar is immaterial in view of this evidence. There is other evidence in the record that the reason the defendant did not divert the cars on April 16th but waited until the 22nd of April, was occasioned by the fact that he was of the opinion that the matter of diverting the cars to the purchaser was to be done by the auction company.

The vital question in the case was whether it was defendant's duty to divert the cars. That was a question for the jury to determine from all the evidence and the court erred in instructing the jury to find the issue for the plaintiff.

On the question of the measure of damages the law is as contended by plaintiff, namely, that if there was a delay for which defendant was blamable in forwarding the lettuce to New York City, as a result of which plaintiff was damaged, the measure of damages would be the difference in the market value of the lettuce at the time it should have arrived, had it been sent as plaintiff requested when it purchased the lettuce, and the market value of the lettuce at the time it actually arrived in that city. Plaintiff offered evidence on this theory, but it was entirely too indefinite. The evidence tended to show that the usual time required in transporting such cars as the cars in question from Chicago to New York was seventy hours; that the cars should have arrived in New York City on April 23nd, but that they did not arrive until April 30th. The evidence shows that at least as to one of the cars some of this delay was occasioned by plaintiff in having the car diverted to Philadelphia. How much delay was occasioned by this fact does not appear.

Moreover, the testimony of the witnesses as to the market value of the lettuce is indefinite. A witness for the plaintiff testified as to what the market price of lettuce was in New York City "around the 22nd of April." This evidence should be more specific as to time. The evidence also as to what the lettuce was sold for in New York City should have been more accurate. The testimony is that the two cars sold for "about $1200.00." Plaintiff's declaration alleged in detail the price obtained for the several crates of lettuce which was to the effect that they had been sold in a number of different lots at specific prices. The exact amount obtained for the lettuce is not the subject of an opinion. Apparently correct records have been kept of this fact. Since there must be a new trial of the case, we think we ought to say that the jury ought to be instructed as to how they should arrive at the amount of damages, if any. No instructions were given to the jury at all. The defendant asked several, all of which were refused, and rightly so, but a question of this character should not be put up to the jury without some instruction.

The defendant was called as a witness and was interrogated by his counsel, concerning the market value of the lettuce in New York City, but upon objection, he was not permitted to testify. We think this was error.

For the errors above mentioned, the judgment of the Superior Court of Cook County is reversed and remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

102 - 30819

JOHN G. COON, for the use of FRANK P. COON,

Appellant,

v.

WEIL-McLAIN COMPANY, a corp.,

Appellee.

243 I.A. 611

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 17, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal plaintiff seeks to reverse an order of the Superior Court of Cook County vacating a judgment and re-instating the cause.

The record discloses that on the 2nd of December, 1924, plaintiff brought an action of assumpsit against the defendant, summons issued returnable to the January term of that court and was duly served on the defendant. Plaintiff filed his declaration on the day the suit was commenced and afterwards the defendant filed his appearance and upon notice, plaintiff was ordered to file a bill of particulars, which was done on the 15th of December, 1924. On December 31, 1924, the defendant filed a demurrer to the declaration. On October 31,1925, the demurrer was overruled and thereupon the defendant was defaulted for failure to plead. The court then, after hearing the evidence, assessed plaintiff's damages at the sum of $4529.96. On December 15, 1925, after the term at which the judgment was entered had expired, the defendant upon notice, filed its petition under Sec. 89 of the Practice Act, praying that the default and judgment be

Opinion filed Nov. 17, 1926.

set aside and vacated. In support of the petition, a number of affidavits were read and certain evidence was offered on behalf of the plaintiff. The defendant demurred to the petition. The court overruled the demurrer, granted the defendant's motion, the default and judgment were vacated and the cause re-instated,and it is to reverse this order that plaintiff appeals.

Plaintiff's verified petition and the affidavits in support of the motion tended to show that the defendant had a meritorious defense and that its counsel had been guilty of no negligence in failing to discover that it had been defaulted, and judgment entered against it until after the term had expired. It further appears that a rule of the Superior Court provides that "No motion will be heard or order made in any cause without notice to the opposite party, when an appearance of such party has been entered, except where a party is in default or when a cause is reached on the call of the trial calendar." Another rule of that court provides that there "shall be first calls of the cases on the calendar, made up by the clerk, for the purpose of ascertaining what causes are ready for trial, on which calls causes will be marked for trial, passed or continued."

The record discloses that the case was on the trial calendar of Judge Holdom, although it was not at issue, defendant's demurrer never having been disposed of, so that obviously the cause was not ready for trial. And apparently when this fact was made known, the matter was transferred to the contested motion calendar and after-

wards the matter came on for disposition on the contested motion calendar when the demurrer was overruled; the defendant defaulted for want of a plea and the court heard the evidence and assessed the damages, without the intervention of a jury. It further appears that the defendant had no notice and was not represented in court when the matter came up in the trial court, nor when the matter was disposed of later on the contested motion calendar, and that the defendant did not learn that it had been defaulted and judgment entered against it until after the passage of the term at which the default and judgment had been entered. Other matters are set up in the record, but in the view we take of the case it will be unnecessary to consider them.

By virtue of provisions of Sec. 89 of the Practice Act, the trial court, after the passage of a term at which a judgment is entered, is given power to correct all errors of fact which might have been corrected by the writ of error coram nobis under the common law. Precision Products Co. v. Cady, 333 Ill. App. 77, and cases there cited. There is no contention by either party to this cause that the above is not the law, but the dispute between them is as to the application of that law to the facts in the instant case. The rule of the Superior Court of Cook County, above quoted, which provided that no motion would be heard or order made in any cause without notice to the opposite party, where his appearance is on file was not complied with, because no notice was given the defendant that plaintiff would ask that the demurrer be disposed of on the contested motion calendar. But the defendant contends that no notice was required under the rule

or otherwise for the reason that the rule does not require notice when the case is reached on the trial calendar, and that the instant case having been reached on the trial calendar the defendant should have been in court at that time. But we are of the opinion that the defendant was not required under the rules to attend the call of the case on the trial calendar, because it knew that since its demurrer had not been disposed of the case could not be tried. Of course, if the defendant had been in court when the case was called on the trial calendar and was then advised that the matter would later be disposed of on the contested motion calendar, it might be that no other notice would be required. But in the instant case the record discloses that the defendant was not in court when the case was called on the trial calendar, and therefore, under the rule, the court was not warranted in disposing of the demurrer on the contested motion calendar without notice to the defendant.

Plaintiff contends, however, that even if the provisions of the rule were not complied with in this respect, the mistake in overruling the demurrer and entering judgment was one of law and not one of fact, and therefore, no relief could be had under Sec. 89 of the Practice Act. In support of this contention the cases of Cramer v. Commercial Men's Assn., 260 Ill. 516 and Brodowicz v. Gonczas, 183 Ill. App. 10 are cited. The Cramer case was in this court and is reported in 176 Ill. App. 1. There the defendant had filed a number of pleas to plaintiff's declaration, but had failed to file an affidavit of merits. Plaintiff having filed an affidavit of claim with his declaration, without notice to defendant, had the pleas stricken and judgment entered against the de-

fendant. One of the contentions was that the rule, which is the same as the one above quoted, if properly construed required notice to the defendant, but this court held that if there was error in construing a rule of court, it was an error of law and not of fact. Upon a further consideration of the case by the Supreme Court, (260 Ill. 516) it was held that the trial courts must be presumed to know their rules and that since the defendant was in default for failure to file an affidavit of merits with his pleas no notice was required under the rule. In the Brodovicz case, another division of this court in passing on the question whether the court should have vacated a judgment under Section 89, said that one of the grounds of the motion was "that the court was not informed as to rule 15 of the Circuit Court" and that the question for decision was "had the trial court the right to vacate a judgment after the term at which it had been entered had passed, because the court had entered the judgment in ignorance of said rule 15". The court there referred to the Cramer case which had but recently been decided in 196 Ill. App. 1, supra. and held that the question involved one of law and not fact, and, therefore, not subject to the provisions of Sec. 89 of the Practice Act. We think none of these cases is in point. The construction of the rule of the Superior Court is not here involved. It provides clearly and explicitly that no motion will be heard or order entered without notice to the opposite party where his appearance is on file, except where one is in default or the case reached on the trial calendar. Here the defendant was not in default and the case was not disposed of on the trial calendar, but the

demurrer was disposed of on the contested motion calendar and at the same time judgment was entered. The clerk of the court should not have placed the matter on the contested calendar without notice. The court assumed, and properly so, that the notice had been given, else the case would not have been on the contested motion calendar. This was an error of fact. Madden v. City of Chicago, 283 Ill. 165; Holbrook v. Lawton, 207 Ill. App. 497.

In the Madden case a suit was dismissed for want of prosecution. After the term had expired at which the dismissal order was entered, a motion was made to vacate that order under Sec. 89. The ground of the motion was that the cause was stricken from the docket by mistake of fact or misprison of the clerk. The prayer of the petition was allowed and the cause re-instated. The record there disclosed that there was a rule of court which provided for first calls of trial calendars for the purpose of ascertaining which causes were ready for trial and that on such call causes would be marked for trial, continued or stricken from the docket, as the case might be; that it was the custom for the attorney on such calls to appear when the case was called and answer whether he wished the case set for trial, continued or stricken from the docket, and thatit was the duty of the clerk to mark the case for trial if counsel had so requested and that on the first call the attorney had requested that the case be marked for trial, but in place of the clerk marking the case for trial, it had been stricken from the docket, later re-instated and still later dismissed for want of prosecution. It was there contended that the mistake was one of law and not of fact, but the

court held that the mistake was one of fact and that the court in making the order merely followed the minute made by the clerk.

In the instant case the learned trial judge found that the order overruling the demurrer and entering judgment against the defendant was entered by the court as a result of the misprison of the clerk of the court and we think the finding is borne out by the record.

The order of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

138 - 30954

H. M. STANFORD,

Appellee,

v.

J. F. O'BRIEN, trading as J. F. O'BRIEN & CO.,

Appellant.

243 I.A. 611

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 17, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover $464.28, which he claimed the defendant had collected as his agent from plaintiff's tenants and which the defendant had refused to pay him. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of his claim.

The defendant in his affidavit of merits set up that he was in the real estate business and had been employed by plaintiff to rent and manage property which consisted of twenty-four apartments; that he had been so employed for three or four years; that during the month of May, 1923, plaintiff had negotiated a sale of the property and requested the defendant to turn over the several leases which were in defendant's possession and which had been negotiated by the defendant; that defendant refused to do this unless plaintiff would agree to pay him the usual commission of 3 percent of the rentals for the unexpired term covered by the leases; that under the universal custom in such case defendant was entitled to such compensation; that thereupon plaintiff agreed that if the leases were returned to him, he would pay the defendant the 3 percent commission or return the leases to the defendant; that thereupon the leases were surrendered but were never re-

H. M. SWANSON,

Appellee,

v.

S. F. O'BRIEN, Trading
as S. F. O'Brien & Co.,

Appellant.

Opinion filed Nov. 17, 1936.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover $1656.38, which he claimed the defendant had collected as his agent from plaintiff's tenants and which the defendant had refused to pay him. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of his claim.

The defendant in his affidavit of merits set up that he was in the real estate business and had been employed by plaintiff to rent and manage property which consisted of three or four rooms; that during the month of May, 1933, plaintiff had negotiated a sale of the property and requested the defendant to turn over the several leases which were in defendant's possession and which had been negotiated by the defendant; that defendant refused to do this unless plaintiff would agree to pay him the usual commission of 5 percent of the rentals for the unexpired term covered by the leases; that under the conversation; that thereupon plaintiff agreed that if the leases were returned to him, he would pay the defendant the 5 percent commission or return the leases to the defendant; that thereupon the leases were surrendered; that after [illegible]

turned to the defendant and he had not been paid, and that 3 percent of the rentals for the balance of the expired terms amounted to $464.28. The affidavit further set up that at the time the plaintiff demanded the leases, defendant had in his possession more than $1700.00 of rentals which he had theretofore collected and after deducting certain expenses incurred in connection with the property and after retaining the $464.28, he paid over the balance to plaintiff except the sum of $3.85, which amount he admitted plaintiff was entitled to receive.

The evidence tends to show that the defendant had been renting and taking care of the property for three or four years prior to the time in question; that there were twenty-four apartments which the defendant rented and for which he prepared leases from time to time as new tenants would be obtained; that he made necessary expenditures in and about the premises as he was authorized to do by the plaintiff and that for the benefit of both parties the several leases were retained by the defendant; that in May, 1923, plaintiff had negotiated a sale of the property and the day after the sale was made he sent another real estate broker to the defendant for the leases; that when the broker made a demand upon the defendant for the leases, the defendant refused to deliver them unless he was paid 3 percent of the rentals reserved by the leases or unless the new owner of the building would continue to have the defendant collect the rents as he had theretofore done for the plaintiff; that the real estate broker whom plaintiff had sent for the leases, thereupon telephoned plaintiff and was advised of the situation and plaintiff then authorized his representa-

turned to the defendant and he had not been paid, and that 3 persons of the rentals for the balance of the expired terms amounted to $464.38. The effective further use by that at the time the plaintiff demanded the lessee, defendant had in his possession more than $1700.00 of rentals which he had theretofore collected and after defaulting contain expenses incurred in connection with the property and after retaining the $464.38, he paid over the balance to plaintiff except the sum of $2.38, which amount he admitted plaintiff was entitled to receive.

The evidence tends to show that the defendant had been renting and taking care of the property for three or four years prior to the time in question; that there were twenty-four apartments which the defendant rented and for which he collected rents from time to time as new tenants would be obtained; that he made necessary expenditures in and about the premises as he was authorized to do by the plaintiff and that for the benefit of both parties the several leases were retained by the defendant; that in May, 1928, plaintiff had negotiated a sale of the property and the day after the sale was made he sent another card onto premises to the defendant for the lessee that upon the proper- made a demand upon the defendant for the lessee, the defend- ant returned to deliver them unless he was paid 3 persons of the rentals received by the lessee or unless the sum owner of the building would continue to have the defendant collect the rents as he had theretofore done for the plain- tiff; that the next day to Dreyer when plaintiff had sent for the lessee, thereupon telephoned plaintiff and was advised of the situation and plaintiff then authorized his represent-

tive to execute a receipt or agreement which was accordingly done. The agreement acknowledged receipt of the leases and stated that plaintiff agreed to return the leases to the defendant or to pay to him the regular commission of 3 percent for the unexpired term of the leases. Upon execution of this document the leases were surrendered. They were not returned, the money was not paid by plaintiff and the defendant did not have charge of the buildings thereafter.

Plaintiff denied that he had authorized his representative to execute such a written agreement, but the court found against him and upon a careful consideration of all the evidence in the record, we think the finding of the court was entirely warranted by the evidence. Although the court found upon the question of fact in favor of the defendant, he held the agreement was a nudum pactum, and therefore, entered judgment in favor of plaintiff and against the defendant for the $464.28. So that the question to be decided is whether there was any consideration moving between the parties to support defendant's contention that he was entitled to retain the $464.28.

Even if we assume that plaintiff was entitled to the physical possession of the leases, yet we think plaintiff was liable to the defendant because at the time of the execution of the receipt defendant was claiming that he was entitled to receive from plaintiff 3 percent of the rentals for the unexpired periods covered by the leases, and the defendant's proposition in substance was that plaintiff must pay him such commission unless the defendant would have charge of the buildings for the new owner. Thereupon plaintiff agreed that if the leases were surrendered to him and if they were not there-

tive to execute a receipt or agreement which was accordingly done. The agreement acknowledged receipt of the lessee and stated that plaintiff agreed to return the lessee to the defendant or to pay to him the regular commission of 5 percent for the unexpired term of the lessee. Upon execution of this document the leases were surrendered. They were not returned, the money was not paid by plaintiff and the defendant did not have charge of the building thereafter.

Plaintiff demied that he had authorized his representative to execute such a written agreement, but the court found against him and upon a careful consideration of all the evidence in the record, we think the finding of the court was entirely warranted by the evidence. Although the court found upon the question of fact in favor of the defendant, he held the agreement was a nudum pactum, and therefore, entered judgment in favor of plaintiff and against the defendant for the $466.38. So that the question to be decided is whether there was any consideration moving between the parties to support defendant's contention that he was entitled to the $466.38.

Even if we assume that plaintiff was entitled to the physical possession of the leases, yet we think plaintiff was liable to the defendant because at the time of the execution of the receipt defendant was claiming that he was entitled to receive from plaintiff 5 percent of the rentals for the unexpired periods covered by the leases, and the defendant's commission unless the defendant would have charge of the building for the new owner. Therefore plaintiff agreed that if the leases were surrendered to him and if they were not there

after returned to the defendant he would pay the 3 percent. Of course, the intention of the parties was not merely the returning of the leases to the defendant, but that the plaintiff would pay the 3 percent unless the new owners would continue to employ the defendant in taking care of the rents for the balance of the unexpired period. At the time in question the defendant had, according to his claim, rendered plaintiff services for which he was then entitled to be paid the 3 percent in question, since plaintiff had sold the property, thereupon plaintiff agreed that he would pay this commission to the defendant unless the new owner continued to have the defendant take care of the property for the remainder of the terms covered by the leases. This was an express contract based upon a valid consideration.

The judgment of the Municipal Court of Chicago is reversed and judgment entered in favor of the plaintiff against the defendant in this court for $3.85, being the amount defendant admitted to be due.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR, P.J. CONCURS;
THOMSON, J. DISSENTING:

I am unable to concur in the decision of this case. It was the contention of the defendant that when he, as a real estate broker, had negotiated leases for the plaintiff he was entitled to receive as a commission for that service, 3 per cent on the rentals involved in the leases; he, looking after the property during the term of the leases as part of the consideration for the payment of that commission. And it was further his contention that ifthe property was sold

after returned to the defendant he would pay the 3 percent. Of course, the intention of the parties was not merely the returning of the leases to the defendant, but that the plaintiff would pay the 3 percent unless the new owners would consume the balance of the unexpired period. At the time in question the defendant had, according to its claim, rendered plaintiff services for which he was then entitled to be paid the 3 percent in question, since plaintiff had sold the property, whereupon plaintiff claimed that he would pay this commission to the defendant unless the new owner constituted an excuse for him. This was an express contract based upon a valid consideration.

The judgment of the Municipal Court of Chicago is reversed and judgment entered in favor of the plaintiff against the defendant in this court for $2.82, being the amount determined to be due.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR, P.J. CONCURS;
MCGOORTY, J. DISSENTING:

I am unable to concur in the decision of this case. It was the contention of the defendant that when he, as real estate broker, had negotiated leases for the plaintiff he was entitled to receive as a commission for that service, 3 per cent on the rentals involved in the leases; he, looking after the property during the term of the leases to next of the commissions for the balance of that commission. [illegible]

before the expiration of the period of the leases, he was, nevertheless, entitled, under the custom, to receive his commission based on 3 per cent of the rentals called for by the leases, for the full terms for which they had been negotiated. It was further the defendant's contention that when the plaintiff sold his building and sent his representative for the existing leases, which were in the defendant's possession, he was unwilling to give them up until he had the plaintiff's assurance that he would be paid 3 per cent, in conformity with the alleged custom, whereupon, the plaintiff made such a promise, agreeing to pay the defendant the 3 per cent commission for the unexpired terms of the leases; unless the new owner retained the defendant to care for the building. The consideration for that express promise, entered into by the plaintiff, was the turning over of the leases.

If the custom contended for by the defendant, in fact, existed, the plaintiff was under a legal obligation to pay the defendant the 3 per cent on the rentals which would become due under the leases for their unexpired terms, and the defendant was entitled to retain an amount equal to those commissions before turning over any balance then in his hands, and he would also be justified in retaining possession of the leases until this adjustment was concluded. When he advised the plaintiff's representative of his intention to do this, the representative saw fit to enter into the express promise to pay the 3 per cent for the unexpired terms, or return the leases, provided the defendant would then turn them over to him so he could close his deal. Although, under the defendants theory the plaintiff was obliged to pay the defendant his commission if the latter was not retained by the new owner, in my opinion, the only consideration

before the expiration of the period of the lease, he was nevertheless, entitled, under the custom, to receive his communication based on 3 per cent of the rentals called for by the lease, for the full terms for which they had been negotiated. It was further the defendant's contention that when the plaintiff sold his building and sent his representative for the existing leases, which were in the defendant's possession, he was willing to give them up until he had the plaintiff's assurance that he would be paid 3 per cent. In conformity with the alleged custom, whereupon, the plaintiff made such a promise, agreeing to pay the defendant the 3 per cent commission for the unexpired terms of the leases; unless the new owner retained the defendant to care for the building. The consideration for that express promise, entered into by the plaintiff, was the turning over of the leases.

If the custom contended for by the defendant, in fact, existed, the plaintiff was under a legal obligation to pay the defendant the 3 per cent on the rentals which would become due under the leases for their unexpired terms, and the defendant was entitled to retain an amount equal to those commissions before turning over any moneys then in his hands, and he would also be justified in retaining possession of the leases until this adjustment was consumated. When he advised the plaintiff's representative of his intention to do this, the representative was LIE to enter into the exparte promise to pay the 3 per cent for the unexpired terms, or return the leases. Provided the defendant would, although, under the defendants theory the plaintiff was bplging to pay the defendant his commission if the latter was not retained by the new owner, in no event, the only consideration

for the plaintiff's express promise was the turning over of the leases. That was a good consideration in and of itself, provided the custom which the defendant contended for, existed, for the defendant's right to retain the leases as security for the payment of his commissions, under the custom, depended upon the existence of the custom. When the defendant sought to prove that custom, objection was interposed to such offer and the trial court improperly sustained it.

In my opinion, the judgment should be reversed and the cause remanded, so that the defendant may have an opportunity of proving the custom he contended for. If such custom is established, then, in my opinion, the turning over of the leases was a good consideration for the plaintiff's express promise to pay the 3 per cent. And, apart from the express promise, if the custom contended for by the defendant is established, the plaintiff would be obliged to pay the defendant his commission of 3 per cent for the unexpired portion of the leases, under that custom, which means that he would have to allow the defendant a credit equal to that 3 per cent in the accounting between the parties. In the event the defendant failed to establish the custom alleged by him, the plaintiff would not be obliged to pay the defendant the commission claimed or allow a credit to that extent, and if the custom were not established, for the reasons above given, the turning over of the leases could not be held to amount to a consideration for the plaintiff's express promise. The real issue in the case was, therefore, the question of whether there was any such custom as the defendant alleged there was in his affidavit of merits.

there was any such custom as the defendant alleged there was in his affidavit of merits.

final issue in the case was, therefore, the question of whether the turning over of the lessee would not be held to amount to a consideration for the plaintiff's express promise. The custom were not established, for the reasons above given, the commission claimed or allow a credit to that extent, and if the defendant failed to establish the custom alleged by him, the plaintiff would not be obliged to pay the defendant per cent in the accounting between the parties. In the event the defendant failed to establish the custom alleged by him, the plaintiff would not be obliged to pay the defendant the commission of 3 per cent for the unexpired portion of the lessee, under that custom, which means that he would have to allow the defendant a credit equal to that 3 per cent in the accounting between the parties. In the event the defendant failed to establish the custom alleged by him, the plaintiff would not be obliged to pay the defendant the commission of 3 per cent for the unexpired portion of the lessee, under that custom, which means that he would have to allow the defendant a credit equal to that 3 per cent in the accounting between the parties.

for the plaintiff's express promise was the turning over of the lessee. That was a good consideration in and of itself, provided the custom which the defendant claimed to existed, for the defendant's right to retain the lessee as security for the payment of his commissions, under the custom, depended upon the existence of the custom. When the defendant sought to prove that custom, objection was interposed to such offer and the trial court improperly sustained it.

In my opinion, the judgment should be reversed and the cause remanded, so that the defendant may have an opportunity of proving the custom he pretended for. It was custom is established, then, in my opinion, the turning over of the lessee was a good consideration for the plaintiff's express promise to pay the 3 per cent. And, apart from the custom, if the custom contended for by the defendant is established, the plaintiff would be obliged to pay

144 - 30963

AMERICAN CHAIN COMPANY,
a corp.,

Appellee,

v.

EMERY MOTOR LIVERY COMPANY,
a corp.,

Appellant.

243 I.A. 611

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 17, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover $2877.10 claimed to be a balance due for certain chains sold and delivered to the defendant. The case was tried without a jury and there was a finding and judgment in plaintiff's favorfor the amount of its claim.

The record discloses that plaintiff, who was engaged in the sale of chains for automobiles and other purposes, had been selling defendant chains for more than ten years. The business done was rather small, averaging not more than $500.00 per year until the years 1924 and 1925, when plaintiff sold the defendant, as it claims, several thousand dollars worth of chains. In the instant case plaintiff is seeking to recover a balance claimed to be due it for six orders of chains, the first of which was sold January 14, 1925 and the last March 30, 1925. The amount for which these goods were sold was $7,496.44 of which plaintiff had received $4,619.34, leaving a claimed balance of $2,877.10. The defendant denied that it had purchased any of the chains from plaintiff. Its defense

AMERICAN CHAIN COMPANY,
a corp.,
Appellee,
v.
MERRY MOTOR FREIGHT COMPANY,
a corp.,
Appellant.

2431.A. 611

Opinion filed Nov. 17, 1938.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover $3877.10 claimed to be a balance due for certain chains sold and delivered to the defendant. The case was tried without a jury and there was a finding and judgment in plaintiff's favor for the amount of its claim.

The record discloses that plaintiff, who was engaged in the sale of chains for automobiles and other purposes, had been selling defendant chains for more than two years. The business done was rather small, averaging not more than $800.00 per year until the years 1934 and 1935, when plaintiff sold the defendant, on 13 claims, several thousand dollars worth of chains. In the instant case plaintiff is seeking to recover a balance claimed to be due it for six orders of chains. The first of which was sold January 14, 1935 and the last [illegible] 7, 1935. The amount for which these goods were sold was $7,496.41 of which plaintiff had received $4,618.54, leaving a claimed balance of $3,877.10. The defendant denied that it had purchased any of the chains from plaintiff. The matter

was that the chains had been purchased by one Maurice W. Loeb who had been an officer of the defendant company, but who had ceased to have any connection with the defendant company before plaintiff sold the chains in question; that plaintiff sold the chains in question; that plaintiff sold the chains to Maurice W. Loeb and not to the defendant; that the defendant did not know that Loeb was purchasing the chains from plaintiff until several months after the last order was given when plaintiff made a demand on the defendant for payment of the balance. The defendant denied liability.

The evidence tends to show that Maurice W. Loeb had been an officer of the defendant Company for a number of years prior to the time that the goods in question were sold and delivered; that during the time he was such officer, the defendant company purchased chains from the plaintiff and that some of these orders were given by Maurice W. Loeb; that a year or more before the goods in question were sold, he ceased to be an officer of the defendant company, but was still employed by it. One of the defendant's witnesses testified that he was in charge of the traffic department, and the evidence further is that Maurice Loeb was paid $90.00 per week by the defendant for his services. The evidence further shows that Maurice W. Loeb did not give all of his time to the defendant but was engaged in dealing in chains on his own account; that his brother Sigmund Loeb was president of the defendant company and owned all of its stock except that he termed "qualifying shares." The evidence is that orders for the chains in question were given by Maurice W. Loeb, calling up the plaintiff and advising that

Maurice M. Loeb, suing on the plaintiff and obtaining that in that orders for the shares in question were given by stock except that be termed "qualifying shares." The evidence was purchased of the defendant company and owned all of its in shares on his own account; that his brother Sigmund Loeb all of his time to the defendant but was engaged in dealing evidence further shows that Maurice M. Loeb did not give $50.00 per week by the defendant for its services. The and the evidence further is that Maurice Loeb was paid testified that he was in charge of the textile department. was still employed by it. One of the defendant's witnesses be caused to be an officer of the defendant company, but that a year or more before the goods in question were sold, and that some of these orders were given by Maurice M. Loeb; the defendant company purchased shares from the plaintiff sold and delivered; that during the time he was such officer, of years prior to the time that the goods in question were had been an officer of the defendant company for a number

The evidence tends to show that Maurice M. Loeb defendant for payment of the balance. The defendant denied liability.

last order was given when plaintiff made a demand on the shares from plaintiff until several months after the that the defendant did not know that Loeb was purchasing sold the shares to Maurice M. Loeb and not to the defendant; plaintiff sold the shares in question; that plaintiff company before plaintiff sold the shares in question; that who had ceased to have any connection with the defendant Loeb who had been an officer of the defendant company, but was that the shares had been purchased by one Maurice M.

he was speaking for the defendant and inquiring whether chains could be furnished by plaintiff; that plaintiff's representative would reply that they would call up their warehouse and then call the defendant back. When this was done the plaintiff would then call up the defendant company and talk to Maurice W. Loeb in regard to making the sale; that one Ben Boucher was associated with Maurice W. Loeb, and after arrangements had been made as above stated, for the purchase of chains, Boucher would fill out orders for the chains on order blanks of the defendant and the same were given to plaintiff; that Boucher would call at plaintiff's place of business where the chains were located and receipt for them in the name of the defendant company. There is in the record considerable correspondence between the parties concerning the chains in question. A number of letters were written by the plaintiff addressed to the defendant requesting payment. These letters were turned over to Maurice Loeb unopened. One of defendant's witnesses testified that all mail in reference to the chains was referred to Maurice W. Loeb by defendant's president, Sigmund Loeb. There also appears in the record a letter written by one of defendant's employes to plaintiff concerning a $2,000.00 check which plaintiff was returning on account of some dispute as to the amount of credit that should be allowed. The evidence further shows that Maurice W. Loeb used stationery of the defendant, including some of its billheads and there is other evidence in the record tending to show that the defendant knew that Maurice Loeb was buying chains from plaintiff and using the defendant's credit. It is true that defendant's president testified he knew nothing of

the matter until a few months after the last chains were delivered when the plaintiff demanded payment and that this was the first information defendant had that Maurice W. Loeb was not dealing with plaintiff in his own individual name and that none of the chains were delivered to the defendant.

The defendant contends that since the evidence shows that Maurice W. Loeb had no direct authority to represent it, it ought not to be held that such authority might be implied on account of the course of dealings between the parties, for the reason that the evidence discloses that plaintiff knew, or if it had used reasonable diligence, it should have known that it was dealing with Maurice W. Loeb individually and not with the defendant; that this is shown by reason of the fact that the amount of the sales suddenly increased from $500.00 per year to several thousand dollars a month; that when the chains were bought by the defendant, it gave a written confirmation for each order; which practice was not followed when the orders in question were given; that plaintiff knew the chains in question were not used by the defendant in its business. We think it would serve no useful purpose to analyze the evidence in more detail because it is undisputed that plaintiff was deceived and whether it acted as a reasonably prudent person would act under similar circumstances, was a question of fact for the court. After a careful consideration of all the evidence in the record, we think the finding of the court was warranted by the evidence. It is certain that we would be unable to hold that the finding of the trial judge in favor of the plaintiff on this question was against the manifest weight of the evidence. It is the law that a principal is bound equally by the authorit

which he actually gives his agent, and by that which his own acts appear to give. Faber-Musser Co. v. Dee Clay Co., 291 Ill. 340.

The evidence discloses that plaintiff thought it was dealing directly with the defendant. It communicated with the defendant over the telephone the same as it had done for years past. It received orders written on the defendant's blank forms signed in the defendant's name by one whom the plaintiff might assume had authority. A number of letters were written by the plaintiff addressed to the defendant and not to Maurice W. Loeb, concerning the transactions in question. These letters the defendant's evidence shows were not opened by any of its employes, but were turned over unopened to Maurice W. Loeb, who maintained an office in defendant's establishment and who as a matter of fact was working for the defendant at $90.00 per week. The facts being as disclosed by the evidence, the question whether Maurice W. Loeb had implied authority, is a question of law. Faber-Musser Co. v. Dee Clay Co., supra; Doggett v. Greene, 254 Ill. 134, and were of the opinion that the trial court did not err in holding that he did have such authority.

There is no merit in plaintiff's contention that the matter is not properly before us because the defendant failed to except or object to the entry of the judgment. Miller v. Anderson, 269 Ill. 608.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

affirmed.

The judgment of the Municipal Court of Chicago is

AFFIRMED.

Keller v. Patterson, 208 Ill. etc.

failed to except or object to the entry of the judgment, the matter is not properly before us because the defendant

There is no merit in plaintiff's contention that counsel did not act in holding that he did have such authority. Greene, 208 Ill. 134, and more of the opinion that the trial of fact. Pinto-Duarez Co. v. Der Glut Co., supra, Duarez v. Pinto-Duarez Co., supra, Duarez Pinto Co. the trouble being as disclosed by the evidence, the question of fact was working for the defendant at $30.00 per week, an office in defendant's establishment and she as a matter turned over unopened to Section E. Loop, who maintained notes were not opened by any of its employes, but were questions in question. These letters the defendant's evidence defendant and not to Service E. Loop, concerning the transof letters were written by the plaintiff addressed to the one upon the plaintiff might assume bad authority. A number defendant's Black forms signed in the defendant's name by done for years past. It received orders written on the with the defendant over the telephone the same as it had was dealing directly with the defendant. It communicated

The evidence discloses that plaintiff thought it

Ill. 560.

Der Glut Co. v. Pinto-Duarez Co., supra, can note appear to give.

apply to mutually given his agent, and by that ruling he

165 - 30984

E. H. EGGLESTON,
Appellee,

v.

ROBERT E. HICKS CORPORATION,
Appellant.

243 I.A. 611

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 17, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action in the Municipal Court of Chicago against the defendant seeking to recover a claimed balance due him of $1485.00. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $835.00.

Plaintiff's statement of claim alleged that he had been employed by the defendant to write articles for a magazine which was published by the defendant; that plaintiff wrote one of such articles in 1919, twelve in 1920, one in 1922 and one in 1923; that they were published by the defendant in defendant's magazine, and were reasonably worth $1500.00; that plaintiff also furnished defendant in April 1923, a drawing which was reasonably worth $25.00; that he had been paid on account the sum of $40.00, leaving a claimed balance of $1485.00. The statement of claim also alleged that on March 31, 1924, plaintiff had rendered an itemized statement to the defendant, showing the balance of $1485.00; that the defendant had not objected to any of the items, and, therefore, there was an account stated between the parties. The

2431A. 611

E. K. MORRISON,

Appellee,

v.

ROBERT E. HOME CORPORATION,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 17, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action in the Municipal Court of Chicago against the defendant seeking to recover a claimed balance due him of $1488.00. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $888.00.

Plaintiff's statement of claim alleged that he had been employed by the defendant to write articles for a magazine which was published by the defendant; that plaintiff wrote one of such articles in 1919, twelve in 1920, one in 1922 and one in 1923; that they were published by the defendant in defendant's magazine, and were reasonably worth $1500.00; that plaintiff also furnished defendant in April 1923, a drawing which was reasonably worth $25.00; that he had been paid on account the sum of $40.00, leaving a claimed balance of $1488.00. The statement of claim also alleged that on March 31, 1924, plaintiff had rendered an itemized statement to the defendant, showing the balance of $1488.00; that the defendant had not objected to any of the items, and, therefore, there was an account stated between the parties. The

defendant in its affidavit of merits denied that it had employed plaintiff to write the articles or to make the drawing, but admitted that plaintiff had written the fifteen articles and delivered them to the defendant, but averred that plaintiff had requested the defendant to publish them in its magazine and that there was a distinct agreement between the parties that defendant was not to pay anything for the articles, except the last one which was written in 1933 and that defendant had paid $40.00 for this article, which was the fair reasonable value of it. The affidavit further denied that the drawing was reasonably worth $25.00 and denied that there had been any account stated between theparties.

After the court had heard the case, made its findings and rendered its judgment thereon, the defendant prayed and was allowed an appeal to this court, and thereafter filed its bond which was approved by the trial court in which it was stated that the appeal was from a judgment of $325.00 and the bond was in the sum of $1400.00. Later when the record was written up by the clerk the amount of the judgment was given as $325.00 and the amount of the bond fixed by the court in allowing the appeal was stated to be in the sum of $400.00. More than thirty days after the judgment was entered plaintiff having learned of the error of the clerk in writing up the judgment, filed a petition in the Municipal Court under Sec. 89 of the Practice Act asking that the judgment be corrected so as to state the truth. This was accordingly done, but over defendant's objection. From this order, however, defendant prayed no appeal. It is obvious that the court was warranted in correcting the judgment and this is conclusively shown by the action of counsel for the defend-

defendant in its affidavit of merits denied that it had employed plaintiff to write the article or to make the drawing, but admitted that plaintiff had written the fifteen articles and delivered them to the defendant, but averred that plaintiff had requested the defendant to publish them in its magazine and that there was a different agreement between the parties that defendant was not to pay anything for the articles except the last one which was written in 1933 and that defendant had paid $60.00 for this article, which was the fair reasonable value of it. The affidavit further denied that the drawing was reasonably worth $25.00 and denied that there had been any assumpsit existed between themselves.

After the court had heard the case, made its findings and rendered its judgment thereon, the defendant prayed and was allowed an appeal to this court, and thereupon filed its bond which was approved by the trial court in which it was stated that the appeal was from a judgment of $2525.00 and the bond was in the sum of $1500.00. Later when the record was written up by the clerk the amount of the judgment was given as $2525.00 and the amount of the bond fixed by the court in allowing the appeal was stated to be in the sum of $1500.00. More than thirty days after the judgment was rendered plaintiff having learned of the error of the clerk in writing up the judgment, filed a petition in the municipal court under Sec. 89 of the Practice Act asking that the judgment be corrected so as to state the truth. This was accomplished, defendant having no objection. It is obvious that the court was merely correcting the judgment and this is merely clear by the action of counsel for the defendant

ant and in filing his bond wherein it was recited that the judgment appealed from was in the sum of $825.00 and the bond $1400.00. Although the order entered by the court correcting the judgment was not appealed from so that the matter is not before us, yet we think we ought to say that, in view of the record, counsel for defendant ought not to be permitted to say that the judgment was improperly corrected.

The defendant contends that the judgment is wrong and ought to be reversed because the finding of the court in favor of the plaintiff is against the manifest weight of the evidence. We think this contention must be sustained. The evidence tends to show that the defendant was publishing a magazine and was rather hard up for money; that defendant's president and plaintiff were apparently rather intimate and met frequently, and that plaintiff wrote the fifteen articles which were all published in the defendant's magazine. Plaintiff testifiedthat he had on a number of occasions spoken to defendant's president about receiving payment for the articles; that he had promised to make payment when defendant was able to do so, and that for this reason plaintiff did not send any bill to the defendant until March 31, 1924. Plaintiff and his daughter also testified that in March, 1923, the defendant's president was riding with them in their automobile in Chicago and at that time defendant's president inquired of plaintiff as to why he was not writing any more articles for the magazine to which plaintiff replied that he had not been paid for the fourteen articles that he had theretofore written and that defendant's president then stated that he would pay

plaintiff for these articles and requested plaintiff to write some more articles; that plaintiff had an article prepared for another magazine and gave it to the defendant, together with a drawing, for which article the defendant through its president then agreed to pay. The defendant's president denied that in that conversation anything was said about the fourteen articles that plaintiff had theretofore written for the defendant's magazine. He further testified that it was agreed between plaintiff and defendant that any articles which defendant might write would be printed in the magazine without cost to the defendant, for the reason that plaintiff was contemplating later publishing them in book form and wanted to see how they would take with the public.

Plaintiff also offered evidence showing that on March 21, 1924, he had mailed an itemized statement, together with a letter to the defendant showing a balance due of $1485.00 and requesting payment, and on April 15, 1924, sent another statement to the defendant, claiming a "balance due as per statement rendered $1485.00", and testified that he had received no reply from defendant to either of the statements. The evidence further shows that, upon the publication of the last article, which was delivered in 1923, the defendant sent plaintiff its check for $40.00 in payment of that article; that shortly thereafter, April 11, 1923, plaintiff wrote the defendant acknowledging receipt of the $40.00 and stating: "I am disappointed in the amount. In the first place the cut or drawings rather, for the illustrations, cost me $25.00. I spend considerable time on the article and had in mind that I would sent it to some other magazine but being loyal to the Specialty Salesman, I gave it to yuu".

When you were in Chicago and the magazine was hard up financially I wrote you twelve consecutive articles without charge. I do not mention this because I regret having done so but you repeatedly told me voluntarily that some day you hoped to be in a position where you could pay me for my articles. The $10,000 receipt you showed me for Government bonds and your statement that you were now buying these regularly, leads me to believe that you are now in a position to pay what articles might be worth.

You are in a better position to judge the value of this article but if they are not worth any more than that, Mr. Hicks, I am candid to tell you that I can not afford to spend the time in writing them."

The defendant appears to have written a letter in reply to this, but it is not in the record. On May 3, 1923, plaintiff apparently replied to defendant's letter wherein he said, "Your letter with reference to the compensation for the magazine article, came to hand sometime ago and I have not answered sooner because I was expecting to see you in Chicago.

There was nothing in particular to answer, except that I want to tell you that there is no feeling on my part of any kind with reference to the matter. The object of my former letter was merely to ascertain about how much you would pay for magazine articles so that I could know whether to write them or not. You know, they take up quite a little of my time and I find that from a momentary standpoint, it will not pay me. However, I will be glad to contribute to the magazine from time to time, if I find the opportunity to do so."

The two letters above mentioned were introduced in evidence by the defendant and no explanation was made on the trial or attempted to be made to rebut defendant's contention that these letters showed that plaintiff was not to be paid for the first fourteen articles. Nor is there any explanation made in the brief filed by counsel for plaintiff in this court, although the brief filed on behalf of the defendant specially stressed these two letters, contending that it was clear that the finding was contrary to the manifest weight of the evidence. We think it appears from these two letters, which were written before any controversy arose between the parties, that plaintiff wrote the fourteen articles with the understanding that he was not to receive any payment for them. These letters were written April 11th and May 3rd, 1923, and no claim was made by plaintiff for payment until nearly a year later, when plaintiff wrote demanding payment on March 21, 1924.

Since there must be a new trial in this case, we think we ought to say that although plaintiff testified that on a number of occasions before writing the article in 1923, he had talked to the defendant's president in reference to being paid, and that on those occasions the defendant promised payment, the defendant's president was not specifically interrogated concerning this matter. The letter from defendant in reply to plaintiff's letter of March 21, 1924, making a demand for payment, was not offered in evidence. These matters as well as others that may occur to counsel, ought to be gone into more thoroughly on the re-trial of the case.

But plaintiff contends that the judgment is right and should be affirmed because there was one count in his statement of claim based upon an account stated since the evidence shows that plaintiff had made a demand for payment, March 21, 1924, by sending an itemized bill to the defendant and again making a demand for payment on April 15, 1924. And since there was no objection or reply by defendant to these two demands for payment, the account became stated. We are unable to agree with this contention because up to March 21, 1924, plaintiff had not demanded payment nor had he according to defendant claimed that any amount was due him. He could not by merely sending two statements and demanding payment, make the defendant liable. The fact that the two statements were sent was properly received in evidence as tending to support plaintiff's claim, for what it was worth, but the letters were not conclusive on the parties. In McCord v. Manson, 17 Ill. App. 118, where an agent had from time to time rendered his principal reports and statements of the business between them and such statements and reports were received and retained without objection by the principal, it was held that such facts were prima facie evidence of an implied admission on the part of the principal of their correctness. No case has been cited and we think none can be found that will sustain plaintiff's contention on this point where the facts are similar.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

But plaintiff contends that the judgment is right and should be affirmed because there was one count in his statement of claim based upon an account stated since the evidence shows that plaintiff had made a demand for payment, March 31, 1884, by sending an itemized bill to the defendant and again making a demand for payment on April 15, 1884. And since there was no objection or reply by defendant to these two demands for payment, the account became stated. We are unable to agree with this contention because up to March 31, 1884, plaintiff had not demanded payment nor had he according to defendant claimed that any amount was due him. He could not by merely sending two statements and demanding payment, make the defendant liable. The fact that the two statements were sent was properly received in evidence as tending to support plaintiff's claim, for what it was worth, but the letters were not conclusive on the parties. In Mercer v. Munson, 14 Ill. App. 118, where an agent had from time to time rendered his principal accounts and statements of the business between them and such statements or reports were received and retained without objection by the principal, it was held that such facts were mating facts of their correctness. No one has been cited and we think evidence of an implied admission on the part of the principal can be found that will sustain plaintiff's contention on this point where the facts are similar.

The Judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

195 - 31014

HARRY ATKINSON, Incorporated,

Appellee,

v.

McNICHOLS & KIMMEL, Incorporated,

Appellant.

243 I.A. 611

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 17, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $360.00 claimed to be due under the terms of a written contract entered into between the parties on March 6, 1924. There was a trial before the court without a jury and a finding in favor of plaintiff for the amount of its claim.

The record discloses that plaintiff was engaged in the advertising business and solicited defendant for its advertising and on March 6, 1924, a written contract was entered into between the parties, whereby the defendant employed plaintiff to do certain advertising work for it for a period of oneyear at $40.00 per month, payable monthly. After the execution of the contract plaintiff proceeded to perform the work for which it was employed by preparing advertisements and seeing that they were properly inserted in newspapers. It was paid monthly in accordance with the terms of the contract for the months of March, April and May. After the month of May plaintiff endeavored to prepare other advertise-

MARY ANNINGER,
Impleaded,

v.

Appellee.

MORTIMER B. KIRBY,
Incorporated,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 17, 1938.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

ments, but apparently none were given and from time to time sent bills to the defendant demanding payment for subsequent month, but none was received. What answer the defendant made to these requests is not shown in the record. On August 29, 1924, defendant wrote plaintiff a letter stating that "due to the depression in general business conditions and to the misinterpretation as to the extent of my authority, this is to advise you that we hereby terminate our contract with you, the same to take effect immediately."

On the trial of the case defendant offered testimony to the effect that at the time plaintiff's representative called on it and secured the contract in question, plaintiff was advised that the president of the defendant company, who signed the contract had been authorized by his board of directors to enter into a contract with plaintiff for a period of three months only and apparently this was acquiesced in by plaintiff's representative, although the contract then presented and signed covered a period of one year. Plaintiff's representative denied that there was any such conversation, so that the question was one of fact for the trial judge.

Defendant contends that the finding of the court in favor of the plaintiff is against the manifest weight of the evidence. We have carefully considered all of the evidence in the record and are clearly of the opinion that the only finding that would be warranted by the evidence would be one in favor of the plaintiff. It would serve no useful purpose to analyze the testimony of the several witnesses on this proposition. All of the parties to the contract were intelligent business men. The contract in plain terms covered a period of one year. Plaintiff after having been paid for the months

business now." The contract in this case covered a period of three months only and ordinarily this was sufficient for a jury to infer that the parties to the contract were intentionally analyzing the testimony of the personal witnesses on this hypothetical -- in favor of the plaintiff. It would seem no useful purpose to dispute that such would be warranted by the evidence would be one in the record and the clearly of the opinion that the only the evidence. We have carefully considered all of the evidence in favor of the plaintiff to support the verdict of defendant contends that the finding of the court on the question was one of fact for the trial judge.

representative denied that there was any such conversation, contacted and signed covered a period of one year. Plaintiff's plaintiff's testimony. although the contract then represented only three months and ordinarily this was contemplated in 24 dictaphone to enter into a contract with plaintiff for a period signed the contract had been submitted by his agent of will was retained that the president of the defendant company, tive called on it and secured the contract in question, plaintiff to the effect that at the time plaintiff's representative with the same to take effect immediately.

On the trial of the case defendant offered testimony to the effect that the contract in question, plaintiff's representative was to be merely tentative and subject to the ratification on the part of defendant, "due to the depression in general business conditions and to the uncertainty as to the extent of advertising." 32, 1954, defendant wrote plaintiff a letter stating that to these requests is not shown in the record. On August month, but none was received. What answer the defendant made some, but apparently none were given and then time to time

of March, April and May made repeated demands for payment for subsequent months and yet the first time defendant attempts to cancel the contract is August 28th, 1924, nearly three months beyond the time when the defendant contends the contract had expired. It appears from the evidence on behalf of the defendant that its president and secretary were present when the contract was signed by plaintiff's representative and by defendant's president. Defendant contends that its president was not authorized to bind it by signing the contract. The evidence offered by the defendant is to the effect that the board of directors passed a resolution authorizing that the contract be entered into for a period of three months but, as we have said, the court believed there was nosuch limitation, and since we further are of the opinion that the finding of the trial judge was entirely warranted, we think the question of the authority of the defendant's president cannot be successfully urged on this appeal.

Upon a careful consideration of all the evidence in the record, we are clearly of the opinion that the defendant's appeal is entirely without merit and the judgment of the Municipal Court of Chicago is, therefore, affirmed.

AFFIRMED.
TAYLOR, P.J. AND THOMSON, J. CONCUR.

TAYLOR, J., AND MACOMBER, J., CONCUR.

APPEARANCE.

The Municipal Court of Chicago is, therefore, affirmed.

Upon a careful consideration of all the evidence in the record, we are clearly of the opinion that the defendant's appeal is entirely without merit and the judgment of the Municipal Court of Chicago is, therefore, affirmed.

defendant's presidency cannot be successfully urged on this appeal.

mentioned, we think the question of the authority of the opinion that the trial judge was entirely there was absent limitation, and since no further use of the of three months but, as we have said, the writ believed asserting that the contract be entered into for a period effect that the board of directors passed a resolution contract. The evidence offered by the defendant is to the its president was not authorized to bind it by signing the tive and by defendant's president. Defendant contends that part when the contract was signed by plaintiff's representa- of the defendant that its president and secretary were pre- tence had expired. It appears from the evidence on behalf months before the time when the defendant executed the con- to cancel the contract in August 1924, nearly three for subsequent months and yet the first time defendant attempts of Byron, April and May made repeated demands for payment

17 - 30487

J. EAVENSON & SONS, INC.,
Plaintiff in Error,

v.

WILLIAM T. SPRY,
Defendant in Error.

243 I.A. 612

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed November 17, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By its amended statement of claim the plaintiff alleged that the defendant, with four others, requested the plaintiff, in writing, to deliver and ship on order of the National Pictorial Soap Sales Company, to which we shall refer as the Sales Company, 1800 gross "Kiddie Soap" and guaranteed the payment of invoices to be rendered by the plaintiff to the Sales Company, "on shipments or deliveries so made on the above order;" that the plaintiff accepted such order and guarantee and at the request of the Sales Company delivered the soap to a warehouse in Chicago for the account of the Sales Company and subject to their order and later sent invoices to the Sales Company for the entire quantity of soap at $6.20 per gross, making a total of $11,160; and that the plaintiff had demanded payment of these invoices from the defendant but he had refused to pay them. The plaintiff also alleged that the defendant, pretending to be an officer or agent or director of the Sales Company, a corporation or pretended corporation, used the name of such company before it had been authorized to do business

17 - 30287

1. RAYMOND & SONS, INC.,

Plaintiff in Error,

v.

WILLIAM T. RYAN,

Defendant in Error.

Opinion filed November 17, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By its amended statement of claim the plaintiff alleged that the defendant, with four others, rendered the plaintiff, in writing, to deliver and ship on order of the Swift Protected Cane Sugar Company, to which we shall refer as the Swift Company, 1800 grass "Kings Cane" and guaranteed the payment of invoices to be rendered by the plaintiff to the Swift Company, "on shipments or deliveries so made on the above order;" that the plaintiff accepted such order and guarantee and at the request of the Swift Company delivered the cane to a warehouse in Chicago for the account of the Swift Company and subject to their order and later sent invoices to the Swift Company for the entire quantity of cane at $2.80 per cwt., making a total of $17,360; and that the plaintiff had demanded payment of these invoices from the defendant but he had refused to pay them. The plaintiff also alleged that the defendant, pretending to be an officer or director of the Swift Company, a corporation or purported corporation, used the name of such company before it had been authorized to do business

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RETURN TO

MECHANICS' CLERK

OF THE COURT.

in this State, and in so doing ordered and purchased from the plaintiff 1800 gross of "Kiddie Soap" for the sum of $11,160; that the plaintiff offered to deliver the goods to the defendant and he refused to receive them and the plaintiff notified him that the goods were held for the defendant in the warehouse in Chicago, subject to the defendant's order; that the plaintiff had demanded payment of the aforesaid amount and the defendant had refused to make such payment.

Plaintiff by its duly qualified agent also made an affidavit for an attachment, alleging that the defendant was a non-resident and that he was concealing himself so that process could not be served upon him; that he had departed from this State with the intention of having his effects removed therefrom and was about to remove his property, to the plaintiff's injury. The attachment writ was issued and thereby an account which the defendant had in the Harris Trust & Savings Bank was tied up. Later the defendant filed his special appearance for the sole purpose of objecting to the jurisdiction of the court. He also made a motion to quash the attachment, in support of which he filed an affidavit denying the allegations set forth in the affidavit which had been filed by the plaintiff. Subsequently, defendant filed a general appearance and an affidavit of merits, with a demand for trial by jury. When the case came on to be tried, both parties submitted their evidence at the close of which the trial court instructed the jury to find the issues against the plaintiff, both as to the attachment and on the merits. That having been done, judgment in favor of the defend-

ant was entered. To reverse that judgment the plaintiff has sued out this writ of error.

The evidence shows that in 1921, the defendant had been engaged in the lumber business in Chicago for 15 years and he had also been engaged in the soap business "as a side line." In November of that year the defendant, with several others, procured a contract to sell "Pictorial Soap" in this territory. This contract was made with one Adelson, president of the Pictorial Soap Manufacturing Co., located in the east. Apparently another concern known as Wilson & Company, located in Chicago agreed to do a considerable amount of advertising in connection with the efforts of the defendant and his associates to sell Pictorial Soap in the Chicago territory. At first the defendant and his associates operated as a partnership and later as an Illinois Corporation, known as the Pictorial Soap Sales Agency, with an office in the Wrigley Building in the City of Chicago. In December, 1921, the defendant and his associates (whether these associates remained the same throughout these transactions does not appear) concluded to form another corporation, and such corporation was chartered in the State of Delaware. It was called the National Pictorial Soap Sales Company and it is this corporation we are referring to herein as the Sales Company. It does not appear that this company has ever complied with the requirements of the Statutes of Illinois as to foreign corporations or that it was ever authorized to do business in Illinois. The evidence further shows that the Sales Company proceeded to occupy the offices in the Wrigley Building which had previously been occupied by the

Sales Agency, the Sales Company taking over all the "office paraphernalia" of the Agency. One of the defendant's associates in connection with the formation of the Sales Company was one Healy, and he took charge of the office of the Sales Company in the Wrigley Building. He testified that he was to be the vice-president of the Sales Company and that the defendant was the president and that the Company's place of business was in the Wrigley Building where Healy was in charge as the manager.

Another of the defendant's associates in this enterprise was one Nesbit. He testified that he was connected with the Sales Company as president and that this company was organized "to take charge of the sales of Pictorial Soap;" that Healy was the vice-president and he was to build up the sales organization and manage the business of the office; that the only business office of the Company was in the Wrigley Building. This witness further testified that the defendant was to be the treasurer of the Sales Company but that that company "never had functioned as no organization could be had on the plans discussed." The evidence further shows that another of the associates of the defendant in the formation of the Sales Company, was one Adelson, the president of the Pictorial Soap Manufacturing Company; the latter apparently being located in New York City with an office at 10 East 43rd street. The credit manager of Wilson & Company, located at the Stock Yards in Chicago, testified that in 1923, Adelson called on him concerning the shipment of "Kiddie Soap" to the Sales Company from the plaintiff Ravenson & Sons, Inc., located in Camden, N.J., the latter being either a subsidiary of Wilson & Company or one of its affiliated companies; that

Milton & Company or one of its affiliated companies; that in Camden, N.J., the latter being either a subsidiary of Sales Company from the plaintiff Emmerson & Sons, Inc., located on his representing the shipment of "Ridgie Cork" to the Storm Yards in Bridge, testified that in 1920. Addison called on him representing the shipment of "Ridgie Cork" to the street. The credit manager of Milton & Company, located at being located in New York City with an office at 10 East 42nd plaintiff Cork Manufacturing Company; the latter apparently another of the associates of the defendant in the formation of the Sales Company, was one Addison, the president of the on the plans discussed." The evidence further shows that company "never had functioned as an organization could be had was to be the treasurer of the Sales Company but that that Building. This witness further testified that the defendant the only business office of the Company was in the Wrigley Neely was the vice-president and he was to build up the sales organization and manage the business of the office; that stated "in his charge of the sales of Pictorial Cork;" that the Sales Company as president and that this company was organ-

Another of the defendant's associates in this enterprise was one Neely. He testified that he was connected with Neely Agency, the Sales Company having even all the "office paraphernalia" of the Agency. One of the defendant's associates in connection with the formation of the Sales Company was one Neely, and he took charge of the office of the Sales Company in the Wrigley Building. He testified that he was to be the vice-president of the Sales Company and that the defendant was the president and that the Company's place of business was in the Wrigley Building where Neely was in charge as the manager.

Adelson wanted 1800 gross of "Kiddie Soap" shipped to Chicago by Eavenson & Sons for the Sales Company, and he represented that a sales force had been employed by the Sales Company to sell that soap in this territory, and the Sales Company wanted a quantity of it on hand here so that deliveries could be made promptly, and for that reason he was anxious to have the soap shipped right away. This witness further testified that he told Adelson that the Sales Company was a new customer and that the witness knew nothing about their credit and they were asking for a lot of soap and he wanted to know how Adelson was going to get rid of it, and how he, the witness, was going to get his money; that Adelson replied that he need not worry about that, and the witness then suggested that the president of the Sales Company "guarantee this account and give us an order so that I know the soap will be taken and that it will be paid for;" and that a few days later Adelson came back with the guarantee in writing, addressed to Wilson & Company, but that the witness told him the account should not be guaranteed to Wilson & Company but to the plaintiff, Eavenson & Sons, and later Adelson returned with a guarantee addressed to Eavenson & Sons, whereupon, the witness "ordered the soap shipped from J. Eavenson & Sons at Camden, N.J. to Chicago." On cross-examination this witness testified that he telegraphed the plaintiff at Camden; that "they were very anxious to get the soap here just as quickly as possible and I wanted to accommodate them in any way that I could;" and he further explained that when he said he "ordered the soap shipped" he was using a common expression in their business which meant that he had approved the credit which the shipment involved, as no goods could be shipped unless the order was approved by the sales department and the credit department, and when he said

he "ordered the goods shipped" he meant that he had approved the credit end of the transaction.

The written document which was delivered to the credit manager of Wilson & Company by Adelson was dated March 2, 1932. It was addressed to the plaintiff and read as follows: "Please deliver and ship on order of National Pictorial Soap Sales Company eighteen hundred (1800) gross 'Kiddie Soap' on terms of sixty (60) days from the date of delivery, delivery to begin within two weeks, and we the undersigned hereby guarante the payment to you of invoices rendered to the National Pictorial Soap Sales Company on shipments or deliveries so made on the above order for 1800 gross." This statement was signed by Adelson, Nesbit, Healy, one Burras and the defendant. There is evidence in the record tending to show that shortly after this document was delivered to the credit manager of Wilson & Company and the plaintiff was notified that the credit involved in the transaction was approved, the soap was shipped to Chicago and placed in the possession of Wilson & Company. About March 13, eleven days after the document of March 2, was executed a credit man of Wilson & Company, working under the credit manager, telephoned to Healy at the office of the Sales Company and asked him for an order for shipment. Healy testified that in this conversation the credit man of Wilson & Company had asked him how the sales of "Kiddie Soap" were getting on and he replied that they had not made any, whereupon the credit man referred to the order for 1800 gross, and he asked Healy to give him delivery orders, and Healy replied he was sorry he could not give him any; that the credit man then said he had to have an order of some kind by the fifteenth, so Healy told him to ship ten gross to his home at Riverside.

the "ordered the goods shipped" he meant that he had observed the credit and of the transaction.

The written document which was delivered to the credit manager of Wilson & Company by Adelson was dated March 3, 1922. It was addressed to the plaintiff and read as follows: "Please deliver and ship on order of National Pictorial Soap Co. Company eighteen hundred (1800) crates 'Middle Soap' on terms of sixty (60) days from the date of delivery, delivery to begin within two weeks, and we the undersigned hereby guarantee the payment to you of invoices rendered to the National Pictorial Soap Co. Company on shipments or deliveries so made on the above order for 1800 crates." This statement was signed by Adelson, Hendit, Healy, one Burton and the defendant. There is evidence in the record tending to show that shortly after this document was delivered to the credit manager of Wilson & Company and the plaintiff was notified that the credit involved in the transaction was approved, the soap was shipped to Union and placed in the possession of Wilson & Company. About March 12, eleven days after the document of March 3, was executed a credit man of Wilson & Company, working under the credit manager, telephoned to Healy at the office of the Soap Company and asked him for an order for shipment. Healy testified that in this conversation the credit man of Wilson & Company had asked him how the sales of "Middle Soap" were getting on and he replied that they had not made any. Whereupon the credit man returned to the order for 1800 crates, and he asked Healy to give him delivery orders, and Healy replied he was sorry he could not give him any; that the credit man then said he had to have an order of some kind by the fifteenth, so Healy told him to ship ten crates to his home at Riverside.

Later, Healy confirmed this in writing by the following communication:

"J. Ravenson & Sons Company,
Camden, N.J.

Gentlemen:-

Confirming our telephone conversation with Mr. Bohart regarding the desirability - indeed the necessity of our complying with our understanding to the extent that we would on or before March 15th give you some delivery orders on the orderwe placed with you for 1800 gross of 'Kiddie Soap:'

Kindly ship by freight collect to

C.F. Healy
Riverside,
Illinois

ten (10) gross - billing to the National Pictorial Soap Sales Company, 614 Wrigley Building.

Very truly yours,
National Pictorial Soap Sales Co.,
C. F. Healy."

The soap referred to in the above communication was shipped to Riverside and Healy had someone canvass that town, and he testified that in this way he sold a few boxes of it.

Bohart, the credit man for Wilson & Company, testified that in the conversation had with Healy over the telephone on March 13, Healy told him to send an invoice for the soap shipped to Riverside, to the office of the Sales Company in the Wrigley Building and also to bill the balance of their order for the 1800 gross to them as they would pay for it whether they took it all out or not, and he instructed one Blair, in the accounting department of Wilson & Company, to bill the soap accordingly. Healy denied giving these billing instructions to Bohart. Blair testified to receiving instructions from Bohart to ship the ten gross to Riverside and to send invoices for that amount and for the balance to the Sales

letter, Healy confirmed this in writing by the following

agreement:-

"J. Dawson & Sons Company,
London, E.C.

Gentlemen:-

Confirming our telephone conversation with
Mr. Robert regarding the desirability - instead the
necessity of our complying with our instructions
to the extent that we would on or before Saturday 15th
file for 1500 grade of 'Kindle Deep'
with for 1500 grade of 'Kindle Deep'
file for 1500 grade of 'Kindle Deep'
with for 1500 grade of 'Kindle Deep'

Kindly ship by freight collect to

E.K. Healy
Riverside,
Illinois

ten (10) grade - Milling to the Midland Pipeworks
Deep Mains Company, 814 Wrigley Building.

Very truly yours,
Midland Pipeworks Deep Mains Co.,
E. F. Healy."

The copy referred to in the above communication was shipped to Riverside and Healy had someone examine their lines, and he testified that in this way he said a few hours of it.

Robert, the credit man for Wilson & Company, testified that in the conversation had with Healy over the telephone on March 12, Healy told him to send an invoice for the coal shipped to Riverside, to the office of the Mains Company in the Wrigley Building and also to bill the Pumpage at their order for the 1500 grade to them as they would pay for it whether they took it all out or not, and be instructed one Healy, in the accounting department of Wilson & Company, to bill the coal accordingly. Healy denied giving these billing instructions to Robert. Their testified to receiving instructions from Robert to ship the grade to Riverside and to send

Company in the Wrigley Building, which he did. These two invoices appear in the record, both dated March 15, 1922, one being for ten gross "shipped to C. F. Healy, Riverside, Illinois." at $6.20 a gross, making $62.00, and the other being for 1790 gross "held in Warehouse 4231 S. Western Blvd. for your account" at $6.20 a gross, making $11,098. No other delivery orders were ever given to the plaintiff or to Wilson & Company on this soap.

On this evidence, we are of the opinion that a prima facie case was made out by the plaintiff to the effect that the defendant and his associates ordered 1800 gross of "Kid ie Soap" and guaranteed the payment of invoices to be rendered to the Sales Company for such soap and that such invoices were rendered. It is contended that under the terms of the guarantee the defendant was not liable for the amount of invoices rendered to the Sales Company unless those invoices involved "shipments or deliveries so made on the above order," to quote the terms of the written guarantee, and that the soap covered by the guarantee was never shipped and delivered, except possibly to the extent of the small part that was sent out to Riverside, and another small quantity also consisting of ten gross, to which we need not refer in detail. With that contention we are unable to agree. The defendant testified that the only concern he ever knew of, that made "Kiddie Soap", was the plaintiff and that when he and his associates were selling that soap under the name of Pictorial Soap Sales Agency they involved small shipments, "so they (meaning the plaintiff) agreed to stock 'Kiddie Soap' in Chicago and deliver in small lots as ordered out." He was asked to describe the process of ordering a lot of "Kiddie

Soap" for his Chicago agency and he answered: "The orders were usually forwarded to Wilson & Company who delivered them by wagon to any place in Chicago * * *. Where the wagon didn't deliver them they would deliver them by express or some other means." Later, when the defendant and his associates ceased to operate as the Illinois corporation known as the Sales Agency and they organized the Delaware corporation known as the Sales Company, and Adelson waited upon the credit manager of Wilson & Company in connection with this shipment of 1800 gross to the Sales Company, and had satisfied that credit manager with his guarantee, signed by Adelson, the defendant and the others, the custom that the defendant described as having existed when the Sales Agency was buying from the plaintiff, was apparently continued, the soap being shipped to Wilson & Company to be sent out by them on shipping orders received from the Sales Company as they sold it. Bohart testified that following his conversation over the telephone with Healy on March 13, he "called the warehouse where this soap was stored and instructed them to bill it and ship the ten gross to Mr. Healy's home." He was then asked whether in using the words "bill it" he was referring to the ten gross, or if not to what, and he answered "to the entire shipment - the 1800 gross of 'Kiddie Soap.'" Blair testified to sending the two invoices above referred to, covering the entire 1800 gross, to the office of the Sales Company. On cross-examination, he was then asked where "this soap was at that time" and he answered, "in the Wilson Laboratories at 4221 S. Western avenue." Later, this witness was recalled to the witness stand, as a witness for the defendant and in the course of his direct examination he was asked: "Did you have 1800

stand, as a witness for the defendant and in the course examination. Later, this witness was recalled to the witness stand, and he identified exhibit 1 as a letter addressed to Mr. Bolton, "in the Citizen Typewriter at 4321 E. Western Avenue." Later, this witness was recalled to the witness stand by the plaintiff and he identified exhibit 2 as a letter addressed to Mr. Bolton, "in the Citizen Typewriter at 4321 E. Western Avenue", and he was then asked where "this same was at that time" and he answered, "In the office of the Dale Company. Of cross-examination, Investigator stated to defendant's counsel that the 1920 issue of 'Riddle Book.' Miss testified to reading the two "bill is," he was referring to the tax issue, or it was to Henly's home." He was then asked whether in using the words interested when to bill it and only the tax issue to 's. he "called the response where this same man stayed and pie conversation over the telephone with Henly on March 15, Company as they said it. Report testified that following sent out by them on shipping orders received from the Dale tioned, the same being shipped to Wilson & Company to be Agency was buying from the plaintiff, was approximately con- the defendant described as having existed when the Dale by Adelson, the defendant and the others, the memos that had notified that credit manager with his guarantee, signed with this shipment of 1920 issue to the Dale Company, and upon the credit manager of Wilson & Company in connection known as the Dale Agency and they organized the Peterson corporation known as the Dale Company, and Adelson waited succeeded caused to operate as the Fidelity corporation or some other means." Later, when the defendant and his wife's maiden name by change." Where the same name formerly formerded to Wilson & Company who delivered them by means to any place in Chicago." Where the Dale Company's deliver them they would deliver them by express

gross of 'Kiddie Soap' on hand at the Wilson warehouse in Chicago on March 15, 1923? and he answered, "Yes". To meet this proof the defendant testified that he went to the Wilson Laboratories a few days prior to the trial of this case and looked over some soap that was stored there and that his estimate of the amount was only 775 gross. We are not here concerned with the value of that testimony. The other testimony we have referred to at least made out a prima facie case for the plaintiff, to the effect that the 1800 gross was sent out to Chicago, and placed in the laboratories of Wilson & Company for thebenefit of the Sales Company, in the same way that previous shipments had been made to the defendant and his associates during the time they had the agency for the selling of "Kiddie Soap" in this territory, and were operating as the Sales Agency. In our opinion the plaintiff made out a prima facie case covering all the terms of the guarantee.

Moreover, the evidence in our opinion also made out a prima facie case for the plaintiff on the other theory referred to in its statement of claim. The evidence tends to show that the Sales Company was doing business in this state without having been authorized so to do. Although it had received its charter the evidence tends to show that its organization was never completed. Section 149 of our Corporation Act, (Ill. Statutes, Chapter 32, section 149) provides that "if any person or persons being, or pretending to be, an officer or agent or board of directors of any corporation, or pretended corporation, shall assume to exercise corporate powers or use the name of such corporation, or pretended corporation, before it has been authorized to do business

under the laws of this State, then they shall be jointly and severally liable for all debts and liabilities made by them and contracted in the name of such corporation, or pretended corporation, and suits at law may be prosecuted therefor by creditors individually." The evidence tends to show that the defendant was one of the officers of the Sales Company or would have been if its organization had been carried out. In executing and delivering the document of March 8, 1922, the defendant and his associates exercised corporate powers and used the name of the Sales Company before it had been authorized to do business under the laws of this State. This, in our opinion, made out a prima facie case against the defendant on that theory of the case.

We are further of the opinion that the plaintiff made out a prima facie case on the issue of non-residence involved in the attachment. In considering what constitutes non-residence under the Attachment Act, it was said in Wells v. Parrott, 43 Ill. App. 656, "Absence from the state and having a fixed abode in another place with the intention to remain permanently, at least for a time, for business or other purposes, will constitute non-residence, even if there be an intention to return at the expiration of the time of residence in the foreign state. Casual or transitory absence from the State will not constitute non-residence within the meaning of the Attachment Act. The absence must be so protracted as to amount to a prevention of legal remedy by ordinary process, and in determining whether one has ceased to be a resident it is important to know whether the purpose of the absence was such as to admit or require the acquisition

of residence elsewhere." A similar decision is to be found in Barron v. Burke, 82 Ill. App. 116. In both of these cases the court followed the decision of the Supreme Court in Board of Supervisors v. Davenport, 40 Ill. 197. In Witbeck v. Marshall-Wells Hardware Co., 188 Ill. 154, there was involved an instruction which the trial court had given the jury, to the effect that "residence necessarily involves the idea of a local habitation or place of abode, and if the jury believe at the time of the issuance of the attachment writ, June 17, 1898, the defendant had no local habitation or place of abode within the State of Illinois, and that he was actually residing without said State permanently, - at least for an indefinite time, - they should find the issues upon the attachment in favor of the plaintiff." The court held that under the evidence presented in that case the instruction was proper, and a correct statement of the law which was applicable. These cases were cited with approval and followed in Stafford v. Wills, 220 Ill. App. 28.

The defendant testified he was in Chicago a few days the first part of March, 1932. It does not appear when he had been here last previous to that date. After being in Chicago a few days at that time he went to Alabama on a pleasure trip and returned here about two weeks later, and after remaining in Chicago two days he went to New York, "to see about * * * representing the Soap Company in the east," and he remained in New York "part of the time from April to September trying to sell Pictorial Soap." He was asked if he was engaged in business down there and he said he was,- in association with Mr. Adelson. He was asked if he had an office there where he conducted his business for that terri-

of residence elsewhere." A similar decision is to be found in Burton v. Burton, 82 Ill. App. 118. In both of these cases the court followed the decision of the Supreme Court in Abbey of Insurance v. Peterson, 60 Ill. 139. In Mitchell v. Mitchell-Wells Nursery Co., 188 Ill. 124, there was involved an instruction which the trial court had given the jury, to the effect that "residence necessarily involves the idea of a local habitation or place of abode, and if the jury believe at the time of the issuance of the attachment writ, June 17, 1898, the defendant had no local habitation or place of abode within the State of Illinois, and that he was actually residing without said State permanently, - at least for an indefinite time, - they should find the issues upon the attachment in favor of the plaintiff." The court held that under the evidence presented in that case the instruction was proper, and a correct statement of the law which was applicable. These cases were cited with approval and followed in Stafford v. Miller, 280 Ill. App. 22.

The defendant testified he was in Chicago a few days the first part of March, 1928. It does not appear when he had been here last previous to that date. After being in Chicago a few days at that time he went to Alabama on a pleasure trip and returned here about two weeks later, and after remaining in Chicago two days he went to New York, "as was about * * * representing the Long Company in the east," and he remained in New York part of the time from April to September trying to sell Pictorial Soap." He was asked if he was engaged in business down there and he said he was-n't associating with Mr. Adjuvan. He was asked if he had an office there where he conducted his business for that interval

tory, and he said he did, at 10 East 43rd Street; that part of the time during that summer he was down at Ocean City, New Jersey, with his family, and that he was in New York he stayed at the Madison Square Hotel most of the time. Under date of August 5, 1922, the defendant wrote a letter to one Friend, of the plaintiff company, on his letterhead which contained the address "10 East 43rd Street, N.Y." and in that letter, among other things, he said that he understood the plaintiff had started a suit "against all five guarantors in Chicago," and that in his case they had started an attachment suit which he thought was a very unfair thing to do, "when you consider that I am down here in New York giving all my time, effort and money toward the promotion of your soap in this territory." The record contains another letter, on the same style letterhead, from the defendant to one Brown, of the legal department of Wilson & Company at Chicago, dated at New York City, August 10, 1922, and in the course of that communication he said, "Since the middle of April I have given all of my time, energy and money to the sale of Pictorial Soap in this territory." Further on in this letter he assured Brown that he was still a citizen of Illinois and had not established a permanent residence in the east. In the course of his testimony the defendant stated that he was handling soap during this period "for my own account down east there;" and later on he testified that he had an office located on 43rd Street and that he purchased the furniture for that office, together with one Harney, and paid the rent for the office for nine months, taking over a lease that was in effect when he went there, that lease having been assigned to him. He did not remember whether the lease expired in December, 1922, or

if not, how long it had to run then. He was asked what disposition was made of the office when he ceased paying rent at the end of 1922, and he said he did not remember. He also testified that he paid the telephone charges incurred at that office, paid for the typewriter that was used there and paid the salesmen their commissions or salaries that were due them, and also paid the stenographer's salary, and, in fact, all the expenses of the office were paid by him. Later he was asked what the occasion was for his discontinuing his office in New York, and he said the only reason was it was a losing proposition and he could not afford to run it any more and that that was the only reason he had for closing it. He was asked if he would have continued that office and his business there if it had proven profitable and he said that he would not have done so as he did not expect to stay there,- that in fact, he had left there before the office was closed up.

In our opinion, the evidence to which we have called attention makes out a prima facie case to the effect that at the time this suit was instituted, in July, 1923, the defendant did not have a place of abode in Illinois but was residing without the State, - "at least for an indefinite time,"- as it was expressed in the instruction approved by the Supreme Court in the Witbeck case, supra.

For the foregoing reasons, the judgment of the Municipal Court is reversed and the cause is remanded to that court.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

STATES' V. V. AND O. CORP., 7. NOV. 1928.

"CRIMINAL REMEDIES AND TRADE CONVENTIONS".

Criminal Courts is reversed and the cause is remanded to that court.

For the foregoing reasons, the judgment of the Supreme Court in the Attack case, supra.

quoting the time,"- as it was expressed in the instruction objected but was nothing without the time" - "at least for an reasonable time" - the defendant did not have a place of abode in Illinois that at the time this suit was instituted, in July, 1928".

applied attention makes out a prima facie case to the effect

In our opinion, the evidence to which we have

ed".

that in fact, he had left there before the office was closed. He would not have done so as he did not expect to stay there"- business there if it had proven possible and he said that He was stated it he would have continued that office and his more and that that was the only reason he had for closing it. a leasing proposition and he would not afford to run it any his office in New York, and he said the only reason was it was he was asked what the consent was for his disappointing fact, all the expenses of the office were paid by him. Inter due them, and also paid the stenographer's salary, and, in and paid the salesmen their commissions or salaries that were at that office, paid for the typewriter that was used there he also testified that he paid the telephone charges incurred here at the end of 1928, and he said he did not remember" disposition was made of the office when he ceased having it not, how long it had to run then. He was asked what

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

LIONEL A. SHERWIN,
Plaintiff in Error.

243 I.A. 612

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Nov. 17, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of Cook County in which it is sought to reverse the judgment of that court, finding the respondent Lionel A. Sherwin, attorney at law, guilty of contempt of court, and imposing a fine of $300 on him by reason of such contempt and ordering further that, in default of the payment of the fine imposed, the respondent stand committed to jail for a period of not to exceed 30 days, or until otherwise discharged by due course of law.

In the brief filed by respondent in this court, he refers to numerous facts which do not appear in the record and which we may, therefore, not consider. In the course of the statement of facts, incorporated by respondent in his brief, he states that he presented a bill of exceptions to the trial judge who entered the judgment appealed from, but, that the judge refused to sign it. There is nothing before us on that question. Nothing appears in the record to substantiate it. If respondent saw fit to file a bill of exceptions and prepare such a bill and submit it for fil-

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
FLOYD A. SHERWIN,
Plaintiff in Error.

Opinion filed Nov. 17, 1938.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of Cook County in which it is sought to reverse the judgment of that court, finding the defendant Floyd A. Sherwin, attorney at law, guilty of contempt of court, and imposing a fine of $500 on him by reason of such contempt and ordering further that, in default of the payment of the fine imposed, the respondent stand committed to jail for a period of not to exceed 30 days, or *until* otherwise discharged by due course of law.

In the brief filed by respondent in this court, he returns no numerous facts which do not appear in the record and which we may, therefore, not consider. In the course of the statement of facts, incorporated by respondent in his brief, he states that he presented a bill of exceptions to the trial judge who entered the judgment appealed from, but the judge refused to sign it. There is nothing before us on that question. Nothing appears in the record to substantiate it. If respondent was ill so as to file a bill of exceptions, we are unable to say that within the time [illegible]

ing and the court refused to receive it, or certify to it, as alleged, there was an orderly method of procedure open to respondent to meet that situation . The People v. Horton, 46 Ill. App. 434.

The only thing contained in the record is the judgment order of the Circuit Court of Cook County, to reverse which respondent has sued out this writ of error. That order was entered in the Circuit Court by Judge Fisher. It recites that, on November 2, 1925, a certain case entitled Toht v. Brown was pending in the Circuit Court; that on October 31, 1925, respondent served a written notice on the attorney for the plaintiff in that case advising him that, at the opening of court on November 2, respondent would appear before Judge Fisher and present a petition, a copy of which was attached to the notice, praying that "the order, judgment or decree, or whatever it may be, which was entered in this case on April 21, 1925, by Judge Torrison" be expunged from the records of the court. The order appealed from then sets forth that on November 2, 1925, in the cause of Toht v. Brown, then pending, respondent filed the petition referred to in the foregoing notice.

The order entered by Judge Fisher recites that the respondent, having shown no just or reasonable cause why he should not be adjudged guilty of contempt of court, and that the court having read the original petition filed by the respondent, as above set forth, and having heard argument of counsel and being fully advised in the premises, finds that on November 2, 1925, respondent appeared before the court and presented the aforesaid petition which is then set out in full in the court's order. As thus set out, the petition

ing and the court refused to receive it, or certify to it.

to respondent to meet that situation. The People v. Horton, 46 Ill. App. 464.

The only thing contained in the record is the judgment order of the Circuit Court of Cook County, to reverse which respondent has sued out this writ of error. That order was entered in the Circuit Court by Judge Fisher. It recites that, on November 3, 1888, a certain cause entitled Ingle v. Bonner was pending in the Circuit Court; that on October 31, 1888, respondent served a written notice on the attorney for the plaintiff in that case advising him that, at the opening of court on November 3, respondent would appear before Judge Fisher and present a petition, a copy of which was attached to the notice, praying that "the order, judgment or decree, or whatever it may be, which was entered in this cause on April 21, 1888, by Judge Horton" be expunged from the records of the court. The order appealed from then sets forth that on November 3, 1888, in the cause of Ingle v. Bonner, then pending, respondent filed the petition referred to in the foregoing motion.

The order entered by Judge Fisher recites that the respondent, having shown no just or reasonable cause why he should not be adjudged guilty of contempt of court, and that the court having read the original petition filed by the respondent, as above set forth, and having heard argument of counsel and being fully advised in the premises, finds that on November 3, 1888, respondent appeared before the court and presented the aforesaid petition which is then set out

consists of a lengthy statement covering nine or ten pages in the record, setting forth many details as to how respondent was called into the case of Toht v. Brown and came to be engaged in that case as attorney for defendant, and other details referring to certain proceedings which had taken place in connection with the course of that case before Judge Torrison, another judge of the Circuit Court of Cook County. This lengthy statement has nothing whatever to do with the question now before this court and it would, therefore, serve no purpose to even set out the substance of it here. Respondent then sets up in his petition that on October 6, (presumably 1934) he was served with a notice by the attorney for the plaintiff in the case of Toht v. Brown, advising him that he would appear before Judge Torrison on October 8, and ask the court to enter a rule requiring respondent to show cause why he should not be punished for what he refers to in hispetition as a "criminal constructive contempt" that he appeared before Judge Torrison on the date last mentioned to answer the petition which he "did under oath, denying the allegation set up in said petition," and that thereafter the court set the matter down for hearing "notwithstanding the fact that petitioner's answer was under oath and, under the law, the court should have discharged the rule as the answer completely purged the petitioner."

Respondent then proceeds in his petition to allege that, sometime before the matter last above referred to came on before Judge Torrison, respondent had advised his clients, whose cases came to be on Judge Torrison's calendar, that he could not represent them in that court, because Judge Torrison had shown a vindictive and hostile spirit toward him and, in

one case which he names, he, at the request of his client, procured a change of venue, and in another case which the respondent apparently tried before Judge Torrison, he alleges the hostility of the judge toward him was very pronounced and apparent. The respondent further alleged in his petition, filed before Judge Fisher, that when this cause came on to be heard on October 8, "on the petition and sworn answer to the rule, the petitioner asked what was there more to be heard and stated to Judge Torrison that petitioner must be adjudged on his answer", but that Judge Torrison "refused to follow the law of the State of Illinois and directed that a hearing be had and heard oral evidence contrary to the law of the State of Illinois and, notwithstanding the fact that such oral evidence clearly vindicated petitioner of any wrong doing", nevertheless Judge Torrison entered a finding of facts in an order entered by him on April 21, 1925, and in this last mntioned order discharged the rule which had been entered and found the respondent not guilty; that the finding of facts which Judge Torrison had included in the order, judgment or decree "or whatever it is Judge Torrison filed in this case on April 21, 1925," was "untrue and not supported by any legal or competent evidence" and that this finding of facts had been made by Judge Torrison "with the sole aim and purpose to humiliate and shame petitioner and blast the reputation of petitioner." Respondent further set up in his petition that he urged before Judge Torrison several times that he had no right to hear evidence and that although Judge Torrison ultimately discharged him, as he should have done, he "at the same time entered chancery findings of fact in a common law order and in a criminal constructive contempt matter prejudicial and damaging to petitioner, and which find-

matter practically and dangerous to petitioner, and with findings in a common law order and in a criminal conservative manner done," he "at the same time entered observed findings of fact Judge Tarlton wrongly discharged him," as he should have times that he had no right to hear evidence and that although in his petition that he urged before Judge Tarlton several *to* place the reputation of petitioner." Respondent further set sole aim and purpose to humiliate and cause petitioner and finding of facts had been made by Judge Tarlton with the supported by any legal or competent evidence" and that this filed in this cause on April 21, 1938," was "untrue and not the order," judgment or decree "or whatever it is Judge Tarlton the finding of facts which Judge Tarlton had included in had been entered and found the respondent not guilty; that and in this last mentioned order disregarded the rule which finding of facts in an order entered by him on April 21, 1938," of any wrong doing," wherefore Judge Tarlton entered a the fact that such oral evidence clearly vindicated petitioner rary to the law of the State of Illinois and, notwithstanding directed that a hearing be had and heard oral evidence con- "required to follow the law of the State of Illinois and must be adjudged on his answer", but that Judge Tarlton more to be heard and stated to Judge Tarlton that petitioner answer to the rule, the petitioner asked what was there on to be heard on October 8, "on the petition and answer tion" filed before Judge Fisher, that when this cause came and answer. The respondent further alleged in his petition the possibility of the Judge toward him was very prejudicial respondent appropriately tried before Judge Tarlton, he alleges procured a change of venue, and in another case with the one case which be named, he, at the request of his client,

ings of fact are not only untrue and not supported by legal or competent evidence, but are contrary to law."

Respondent prayed in this petition filed by him before Judge Fisher on November 2, 1935, "that this so-called order, judgment or decree, or whatever it may be called, of April 21, 1935," with the exception of the last paragraph "be expunged from the records of this court, and your petitioner prays for other and further relief in this matter because your petitioner says that this so-called order, judgment or decree, and particularly the findings of fact therein, are contrary to law, not based on any law and are the result of hatred and vindictiveness of said Judge Torrison against said petitioner."

The order entered by Judge Fisher, after setting forth the filing of the petition by the respondent Sherwin, recites that the case of Toht v. Brown, above referred to, was then pending in the Circuit Court of Cook County and undisposed of and that the foregoing petition was presented by respondent in that case, in open court. The record shows that the petition was entitled, in the case of Toht v. Brown. Judge Fisher's order then recites that when the respondent presented the petition or requested the court to read it, that the court suggested that this would be done later when the motion came on to be heard; that thereupon respondent left the petition with the minute clerk for filing, and it was, by him, duly and properly filed; that later, on November 16, the court being in session to pass upon motions and petitions, the case of Toht v. Brown which was still pending and undisposed of, came before the court and the attorney for the plaintiff in that case called the attention of the court to the petition that had been filed by respondent Sherwin and

ines of fact are not only mature and not supported by legal or competent evidence, but are contrary to law."

Respondent replied in this petition filed by him before Judge Ilgner on September 8, 1958, "that this so-called order, judgment or decree, or whatever it may be called, of March 27, 1958," with the exception of the last paragraph "be stricken from the records of this court, and your petitioner be allowed his costs herein and further relief in this matter proper; that petitioner says that this so-called order, judgment or decree, was particularly the finishing feat thereof, that petitioner had not been served with any notice of hearing on any law and the result of petitioner's motion to dismiss the petition."

The order entered by Judge Ilgner, after noting the filing of the petition by the respondent therein, recited the case of Toft v. Brown, above referred to, and then reciting in the Grounds Court of Good County and that the petition was entitled, "In the Case of Toft v. Brown," and that the foregoing petition was presented by respondent in that case, in open court. The record shows that the petition was entitled, "In the Case of Toft v. Brown." Judge Ilgner's order then recites that when the respondent presented the petition to transmit the court to send it, that the court suggested that this would be done later when the motion came on to be heard; that thereupon respondent left the petition with the minute clerk for filing, and it was, in fact and regularly filed; that later, on December 19, 1957, the court heard in session to hear upon motions and petitions, and the petitioner appeared in person and by counsel, and respondent appeared by counsel, and the court heard the motion to dismiss the petition, and the court being fully advised in the premises, finds that the motion to dismiss should be sustained, and that the petition should be dismissed, and that petitioner should take nothing by his petition, and that respondent should have and recover from petitioner his costs herein expended, taxed at $ 25.00, and that execution issue therefor.

the latter then asked the court for leave to withdraw his petition and the court reserved its ruling at that time and directed the respondent Sherwin "then and there to show cause why he should not be punished, as in and for direct contempt of this court." By the order of Judge Fischer, the court then proceeds to find that certain language used by the respondent in his petition, which language is quoted in full in the order and is hereinabove set forth, was contemptuously used by the said Lionel A. Sherwin and calculated to hinder and embarrass the administration of justice in the case then pending, which said language "seriously reflects on the honesty and integrity of the court with reference to its action in such pending case." By the terms of the order the court then proceeds to find that the respondent Sherwin was guilty of a direct contempt of court and the order assesses a fine of $300.00 against the said respondent for such contempt and provides that, in default of the payment of such fine, respondent shall stand committed to jail for a period not to exceed 30 days or until he may be otherwise discharged by due course of law. The order then recites that the respondent Sherwin requested leave to file a written answer to the matter of the direct contempt, which request was denied by the court.

Throughout the history of jurisprudence, courts of justice have possessed the power to punish acts of contempt committed against them. Such a power is necessarily inherent in a duly organized court and without it a court would be a powerless and an impotent arm of the government. At various times in different jurisdictions, this power has been the subject of legislation. It was so at one time in this state

the latter then asked the court for leave to withdraw his petition and the court reserved its ruling at that time and directed the respondent Sherwin "then and there to show cause why he should not be punished, as in and for direct contempt of this court." By the order of Judge Fleeher, the court then proceeds to find that certain language used by the respondent in his petition, which language is quoted in full in the order and is hereinabove set forth, was contemptuously used by the said Lionel A. Sherwin and calculated to hinder and embarrass the administration of justice in the case then pending, which said language "seriously reflects on the honesty and integrity of the court with reference to its action in said pending cause." By the terms of the order the court then proceeds to find that the respondent Sherwin was guilty of a direct contempt of court and the order assesses a fine of $300.00 against the said respondent for such contempt and provides that, in default of the payment of such fine, respondent shall stand committed to jail for a period not to exceed 30 days or until he may be otherwise discharged by due course of law. The matter then recites that the respondent Sherwin requested leave to file a written answer in the matter of the direct contempt, which request was denied by the court.

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but the power of the court to punish for contempt is not dependent upon legislation for existence. Such power is part of the common law.

The contempt of which the trial court found the respondent guilty was a direct criminal contempt. Words spoken or acts done in the presence of the court, which tend to subvert, embarrass or prevent the administration of justice, is known as a direct contempt. Language addressed to the court intimating that a judge is ignorant or unfair or is knowingly and wilfully ruling against the law and the evidence, and solely because of his dislike of counsel, is in the nature of a direct contempt. 6 R.C.L. 491. Such a contempt is also in the nature of a criminal contempt, which has been defined as consisting of conduct that is directed against the dignity and authority of the court. 13 C.J.6. Where a direct contempt is committed in the presence of the court summary punishment may be imposed without the entering of a rule to show cause. 13 C.J. 63.

As was pointed out by Winslow J. in State ex rel Attorney General v. Circuit Court for Eau Claire County, 87 Wis. 1. The power of courts to punish for contempt, arises by implication from the act of creating the court and has been recognized in all courts from time immemorial. Such a power "is, and must be, a power arbitrary in its nature, and summary in its execution. It is, perhaps, nearest akin to despotic power of any power existing under our form of government. Such being its nature, due regard for the liberty of the citizen imperatively requires that its limits be carefully guarded, so that they may not be overstepped.

It is important that it exist in full vigor; it is equally important that it be not abused. The greater the power, the greater the care required in its exercise. Being a power which arises and is based upon necessity, it must be measured and limited by the necessity which calls it into existence." Similar sentiments were expressed by our Supreme Court in Stuart v. The People, 4 Ill. 395, decided in 1842, and again in Storey v. The People, 79 Ill. 45, decided in 1875. Both of those cases involved the publishing of articles in newspapers, reflecting, in the Stuart case, upon the court and jury; and in the Storey case, upon a grand jury. In both of those cases the court held that no contempt had been committed. In our opinion, neither case is applicable to the situation presented here. In the Storey case the action of the grand jury, referred to in the article which was alleged to constitute a contempt of court, had been concluded at the time the article was published. The court held that any publication, no matter how disrespectful, when applied to jurymen in regard to the manner in which they had discharged a duty can be said to embarrass or obstruct the administration of the law, and, such being the case, that the publication could not be treated and punished summarily as a contempt of court. This and other similar cases are relied upon by the respondent. Another such case relied upon by the respondent is The People v. Hoyne, 195 Ill. App. 272, in which it appeared respondent, in a public speech had severely criticised certain acts of one of the judges of this county, such speech being made about a year after the matter thus criticised had been disposed of. It was there held that the question presented was not whether the respondent had slandered the judge but whether he had committed a criminal contempt of court, and it was held

that he had not.

It has been generally held that criticism of the action of a court in a matter which has been disposed of, is not such action as may be summarily punished as a contempt of court. 17 L.R.A. (N.S.) 573. The respondent contends that such is the case here, but in support of that position he presents an argument based on facts which are entirely outside this record. Moreover, the record shows that the petition which respondent filed, which contained the language held by the trial court to be a contempt of court, was filed by him in a case entitled Toht v. Brown, and the order of the trial court recites that this was a case then pending before the court and undisposed of. Moreover, the nature of the statements made and the language used by the respondent, which wereheld to amount to a contempt of court, were quite different from those involved in the cases relied upon by the respondent, some of which we have referred to above.

As was pointed out by the Supreme Court in the recent case of The People v. Metzen, 291 Ill. 55, "judges are not exempt from just criticism and whenever there is proper ground for serious complaint against a judge it is the right and duty of a lawyer to submit his grievances to the proper authorities, but the public interest and the administration of the law, demand that the courts should have the confidence and respect of the people. Unjust criticism insulting language and offensive conduct toward the judges, personally, by attorneys, who are officers of the

that be not so.

It has been generally held that criticism of the action of a court in a matter which has been disposed of, is not such action as may be summarily punished as a contempt of court. 17 C.J.S. (U.S.) 870. The respondent contends that such is the case here, but in support of that position he presents an argument based on facts which are entirely outside this record. Moreover, the record shows that the petition which respondent filed, which contained the language held by the trial court to be a contempt of court, was filed by him in a case entitled Todd v. Burke, and the order of the trial court recites that this was a case then pending before the court and undisposed of. However, the matter of whether remarks made and the language used by the respondent, which warrantd to amount to a contempt of court, were quite different from those involved in the cases relied upon by the respondent, some of which we have referred to above.

As was pointed out by the Supreme Court in the recent case of The People v. Nelson, 201 Ill. 89, "Judges are not exempt from just criticism and whenever there is proper ground for serious complaint against a judge it is the right and duty of a lawyer to submit his statements to the proper authorities, but the public interest and the administration of the law, demand that the courts should have the confidence and respect of the people. Unjust criticism hamstring judges and effective conduct toward the judges, personally, by attorneys, who are officers of the

court, which tend to bring the courts and the law into disrepute and destroy public confidence in their integrity, cannot be permitted." We give our full support to the proposition that a due regard for the liberty of the citizen requires that the limits of the power of the courts to punish acts as and for a contempt, must be carefully guarded and that it is important that this power be not abused, but we recognize that it is also important, not only that this power exist, but that courts must and should have the courage to use it when the occasion demands. There is no disposition to question the right of anyone to criticise the actions of the court or its judges, but, as pointed out by the Supreme Court of Nebraska in the case of In re Dunn, 85 Nebr. 606, "If the officers of the court, as attorneys are, are permitted to assail the judges, by briefs or other papers filed in and made a part of the records of the court, and thereby seek by questionable and unfair means to destroy the respect which is and should be entertained for the court as the highest judicial tribunal in the state, it would not be long until all respect for it would, and probably should, be lost. There is a well recognized duty imposed upon the judge or judges to see that the respect and integrity of the courts are maintained, and, unpleasant as it may be, we cannot evade or flinch from the discharge of that duty." The case of In re Pryor, 18 Kas. 72, involved a letter sent by a lawyer to a judge, commenting upon an order which the lawyer had just learned had been entered by the judge in a pending matter, in which the lawyer was engaged as counsel. In the course of its opinion the court said that "the independence of the profession carries with it the right freely to challenge, criticise, and condemn all matters and things under review

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that the respect and integrity of the courts are maintained,
and, unfortunately it may be, no method exists or flows from
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Kan. 72, involved a letter sent by a lawyer to a judge, com-
menting upon an order which the lawyer had just learned had
been entered by the judge in a pending matter, in which
the lawyer was employed as counsel. In the course of its
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ciary may exist with it the right freely to criticise,
writing, and speaking all matters and things under heaven

and in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending. * * * A failure to extend this courteous and respectful treatment, is a failure of duty; and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt. * * * If the language or conduct of the attorney is insulting or disrespectful, and in the presence, real or constructive, of the court and during thependency of certain proceedings, we cannot hold that the court exceeded its power by punishing for contempt."

If the language used by the respondent in this case was such as could properly be considered a contempt of court, the fact that it was incorporated in a petition duly filed in court, in which the respondent, as petitioner, sought to have the action of the judge, to whom his language referred, vacated, does not affect the situation. As was pointed out in The State v. Soule, 8 Robinson's Report, (La.) 500; "It would be strange indeed if it were permitted to counsel deliberately to write out and file among the records of the court, in the recess between its sittings, the most opprobrious calumnies and abuse of the highest tribunal in the State, without any responsibility, when if the same language had been used in the heat and excitement of an oral argument, it would instantly have consigned the speaker to the walls of a prison. Common sense, law, and justice, all forbid, that a party shall secretly place among the records of this court, with impunity, a document which the author of it would not have been permitted to read in public, and which, if he had attempted to read, would have brought upon

wise, it be not attempted to read, would have brought down of it would not have been permitted to read in public, and of this court, with impunity, a document which the author feared, that a party might accredit among the records the wells of a prison. Common sense, law, and justice, all argument, it would instantly have consigned the speaker to language had been used in the best and ablest manner of an oral the Rule, without any responsibility, when it the same objectionable sentiments and abuse of the highest tribunal in of the court, in the terms between its sitting, the most counsel deliberately to write out and file among the records BOD: "It would be strange indeed if it were permitted to pointed out in The State v. Bundy, 2 Robinson's Report, (in.) referred, warned, does not effect the situation. As was sought to have the action of the judge, to whom his language duly filed in court, in which the respondent, as petitioner, of court, the fact that it was incorporated in a petition case was such as would properly be considered a contempt

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by punishing for contempt."

cealing, we cannot hold that the court exceeded its power strument of the attorney is a misuse of the power and duty of the court during the pendency of certain pro- ceedings or disrespectful, and in the presence, tend or con- tempt. "* * * If the language or conduct of the attorney is so to warrant the exercise of the power to punish for con- in a failure of duty and it may be no cause a dereliction a failure to extend this courteous and respectful treatment, the tribunal in which the proceedings are pending. * * * pending obligation of constant courtesy and respect toward and in exchange. But with this privilege goes the corres-

him certain punishment." Other cases in which language incorporated in a written document was held to amount to a contempt of court are: (language contained in a petition for rehearing) In re Chartz, 28 Nev. 110; In re Wooley, 74 Ky. 95; McCormick v. Sheridan, 20 Pac. 24; (language contained in a brief) Friedlander v. The Sumner Gold & Silver Mining Co., 61 Cal. 116; Sears v. Starbird, 75 Cal. 91; First National Bank v. Superior Court, 12 Cal. App. 335; (language contained in a letter sent to the judge) In re Pryor, 18 Kas. 72; and (language written by a lawyer on the court's docket) Ex Parte Smith, 28 Ind. 47. None of these cases involved the filing of the document containing the language complained of, in open court. In none of them does thecourt pass directly on the question of whether the contempt involved was direct or indirect. In the majority of them the circumstances were such as to make the contempt, indirect in character, and the court so treats it.

The language written by the lawyer on the court's docket in Ex Parte Smith, supra, contained the same imputation as that to be found in the language used by the respondent in the case at bar. The notation written by the lawyer on the court's docket was as follows: "Having become satisfied that we cannot get the law administered, by direction of the plaintiff I hereby dismiss this action. * * * When law ceases to be paramount, liberty ceases." The substance of that statement amounted to a charge that the court there referred to deliberately refused to follow what it knew to be the law and his actions in that regard were such as to amount to a denial of liberty to litigants in his court. The court held such

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language to be "a direct insult to the court and a gross contempt of its authority," and that it fully justified punishment for contempt.

The language involved in the case of In re Pryor, supra, was also very similar to that employed by the respondent here. In that case the lawyer punished for contempt of court, made a statement that an order which the court had just entered was "directly contrary to every principle of law governing injunctions, and everybody knows it, I believe." The lawyer then went on to announce that he would prosecute an appeal from the order, "for it is our desire no such decisions or orders shall stand unreversed in any court we practice in." In holding such language to be a contempt of court, the court said that:

> "to say to a judge that a certain ruling which he has made is contrary to every principle of law, and that everybody knows it, is certainly a most severe imputation. * * * It is not merely an assertion of a difference of opinion, but a charge that he has decided in a way that he as well as everybody else knew to be wrong. To say to a judge that his ruling is contrary to every principle of law, may be simply a reflection upon his intelligence; but to couple with it an assertion that everybody knows it, is clearly an imputation upon his integrity. How can a judge be honest, and yet decide contrary to that which he as well as all others knows to be the law? * * * An attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court and it is therefore his duty to uphold its honor and dignity. Certain privileges attach to him by reason of such official position. * * * We often hear from the lips of counsel in argument, or read in the briefs filed in proceedings in error in this court, the most severe animadversion and criticism upon the conduct and rulings of the courts from which theproceedings are brought. * * * The independence of the profession carries with it theright freely to challenge, criticise, and condemn all matters and things under review and in evidence, but with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending. * * *

language to be "a direct insult to the court and a grave contempt of its authority," and that it fully justified punishment for contempt.

The language involved in the case of In re Green, supra, was also very similar to that employed by the respondent here. In that case the lawyer published an article in a newspaper which stated that an order which the court had just entered was "directly contrary to every principle of law governing injunctions, and everybody knows it." The lawyer then went on to announce that he would prosecute an appeal from the order, "for it is our desire to seek relief and reversal in any court to which we may resort in obtaining justice in." In holding such language to be a contempt of court, the court said that:

> "It may be a judge that a certain ruling which he has made is contrary to every principle of law, and that everybody knows it, is certainly a most severe indictment. * * * It is not merely an assertion of a difference of opinion, but a charge that he has decided it in a way that he as well as everybody else knew to be wrong. To say to a judge that his ruling is contrary to every principle of law, may be simply a reflection upon his intelligence; but to assert that it is an assertion that everybody knows it, is clearly an imputation upon his integrity. How can a judge be honest, and yet decide contrary to that which he as well as all others knows to be the law? * * * An attorney is under special obligations to the courts and respected in its conduct and treatment of questions to a judge. It is an affront of the most grievous sort and tends to destroy the dignity of the court, or even in the trial of such officials testing. * * * To place any form of unfair pressure in advance of the trial of a cause in the courts, or even in the trial of a cause in a court, the very life of which depends upon the confidence of the people in the integrity and impartiality of the judges, and the fairness of their rulings and actions, is a most serious contempt of the courts from which obstruction and resistance will arise. It strikes directly to destroy, utterly, the independence of the judges, and the very foundations of the structure of government. * * * The interference with the orderly administration of justice by the courts, by the publication of comment and criticism, with reference to pending litigation, is a most serious contempt of court, and is punishable as such. * * * The power of the courts to punish for contempt is inherent in their very organization, and is necessary to the exercise of the functions with which they are charged. * * * The power to punish for contempt is not arbitrary, but with this privilege goes the correspondingly grave responsibility of using it with calmness and dignity, and only in such cases as the administration of justice requires. * * * The power is not to be used to gratify the personal feelings of the judges, but to preserve the power and majesty of the law, and to secure the proper administration of justice."

> A failure to extend this courteous and respectful treatment is a failure of duty; and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt. * * * Suppose in a public trial in the court-house, after a ruling had been made, an attorney in the case should say to the court: 'That ruling is not the law, and your honor knows it.' Who would doubt that the court might rightly treat such language as contempt and punish it accordingly? Yet practically that is this case."

As already noted, the language which was held to amount to a contempt of court in the Pryor case, was contained in a letter addressed to the court by the lawyer involved.

In our opinion, the language used by the respondent in the case at bar is more reprehensible than that involved in the case just referred to. Here the respondent asked Judge Fisher to expunge from the records of the court, certain parts of an order which had been entered by Judge Torrison in a matter involving another alleged contempt of court on the part of the respondent, and in support of this request he filed a petition alleging that Judge Torrison had "refused to follow the law of the State of Illinois," and that the findings of fact incorporated by Judge Torrison in his order, "or whatever it is which Judge Torrison filed in this case," were "untrue and not supported by any legal or competent evidence," and then respondent proceeds to allege in his petition that notwithstanding this was the case, Judge Torrison nevertheless incorporated these findings of fact in his order "with the sole aim and purpose to humiliate and shame" respondent, and "blast" his "reputation"; and finally, the respondent closed his petition by alleging that the order which Judge Torrison had entered, "particularly the findings of fact therein, are contrary to law, not based on any law, and

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As already noted, the language which was held to amount to a contempt of court in the Pryor case, was contained in a letter addressed to the court by the lawyer involved.

In our opinion, the language used by the respondent in the case at bar is more reprehensible than that involved in the case just referred to. Here the respondent asked this court to review an order which had been entered by Judge Tuthill in a matter involving another alleged contempt of court on the part of the respondent, and in support of this request he filed a petition alleging that Judge Tuthill had "refused to follow the law of the State of Illinois," and that the findings of fact incorporated by Judge Torrison in his order, "on whatever it is which Judge Torrison filed in this case," were "untrue and not supported by any legal or competent evidence," and that respondent proceeds to allege in his petition that notwithstanding this was the case, Judge Torrison nevertheless incorporated these findings of fact in his order "with the sole aim and purpose to publish and cause" respondent, and "Oliver Nix Trucking Co." and finally, the respondent closed his petition by alleging that the order which Judge Torrison had entered, "particularly the findings of fact therein," are contrary to law, not based on any law, and

are a result of hatred and vindictiveness of the said Judge Torrison," toward the respondent. It will be noted that the respondent did not merely seek relief, pursuant to his contention that Judge Torrison had entered an order not supported by proper evidence, and contrary to what respondent contended to be the law which was applicable, but he alleged that in a proceeding charging him with contempt of such a nature as entitled him to purge himself on a sworn answer, he had so purged himself and was thus entitled to his discharge and that although Judge Torrison had discharged him on his sworn answer, he, nevertheless, contrary to the law, had heard evidence and then had proceeded to incorporate certain findings of fact in his order, for the sole purpose of humiliating and shaming the respondent and blasting his reputation, and that these findings were the result of the hatred and vindictiveness of the judge toward him. This amounted to a charge that the court had deliberately entered an order containing certain findings which he knew to be contrary to both the law and the evidence, solely for the purpose of venting his hatred and wrath upon the respondent and ruining his reputation, a charge amounting to one of total unfitness, if not corruption. If a lawyer stood forth in open court and made any such charge, one could certainly have no respect for the court if it were not treated as a contempt and summarily punished as such. The use of such language is not less reprehensible when it is incorporated deliberately in a court document, and filed in open court, as was the case here. Even if one might excuse language making such a serious charge as this, made on the spur of the moment in the heat and excitement of a trial, it is difficult to see how such could be the case where the language does not

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tempt of court a motion be entered by Judge Jamison himself on
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writing such a serious charge as this, made on the bench of the
record in the heat and excitement of a trial, it is difficult

occur in that fashion but is written out and prepared with deliberation in one's office, and with equal deliberation carried to court and filed.

In the case of Sears v. Starbird, supra, a lawyer made a statement in a brief, which was an intimation that the judge of the court below did not act from proper motives, but from his love for the cause, the parties to it or their counsel, and that he had patched up and doctored the case of the plaintiffs, which perhaps the carelessness of their counsel "had left in such a condition as to entitle them to no relief whatever." That was held to be a contempt of court. In the case at bar we have somewhat the opposite, where counsel has charged the court with entering an order contrary to the law and the facts, solely because of his hatred for respondent and to bring about the ruin of his reputation. If a lawyer ever deems he has ground for such serious complaint against a court, it is his right and his duty to submit his grievances to the proper authorities. People v. Metzen supra. Respondent did not take any such course, but saw fit to file a petition in the pending case, using language to which we have referred. One may not be permitted, when a court has entered an order that he does not like, either to stand in open court or to file a petition or other document, and say that the court has acted, knowingly, against the law and the facts, and solely because of his hatred tow rd the one who is complaining, and thereby seeks to ruin his reputation. Such a course of conduct, in our opinion, amounts to an insult to the court, and to permit such conduct to go unpunished would necessarily bring both the courts and the law into disrepute and destroy public confidence in their integrity. The use of such language

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In the case of Beatie v. Butterfield, supra, a lawyer made a statement in a brief, which was an intimation that the judge of the court below did not act from proper motives, and that he had patched up and doctored the case ...ment from his love for the cause, the parties to it or their counsel, and that he had not given the case the ... of the plaintiff, which perhaps the counselmanes of their counsel had left in such a condition as to entitle them to no relief whatever." That was held to be contempt of court. In the case at bar we have somewhat the opposite, where counsel has charged the court with entering an order contrary to the law and the facts, solely because of his hatred for respondent and to bring about the ruin of his reputation. It a lawyer ever deems he has ground for such serious complaint against a court, it is his right and his duty to submit his grievances to the proper authorities. People v. Hatton, supra. respondent did not take any such course, but was fit to file a petition in the pending case, using language to which we have referred. One may not be permitted, when a court has entered an order that he does not like, either to stand in open court or to file a petition or other document, and say that the court has acted unjustly, against the law and the facts, and solely because of his hatred for the one who is complaining, and thereby seeks to ruin his reputation. Such a course of conduct, in any opinion, amounts to an insult to the court, and to permit such conduct to be maintained would necessarily bring both the courts and the law into disrepute and destroy ...

is, in our opinion, properly considered as a direct contempt of court. In contending that in no event could the contempt charged against him be considered a direct contempt, respondent has called our attention to a number of cases and among them State v. Reid, 118 La.827; State v. Jasper, 88 S. E. 1096, and Johnson v. State, 87 Ark. 45. In our opinion these cases may all be distinguished from the case at bar on the facts involved.

Respondent contends that in no event did he commit any contempt against Judge Fisher and that, therefore, the latter erred in finding him guilty of contempt. Where one uses contemptuous lang uage in a court, involving a reference to the action of another judge, the contempt is properly treated as having been committed against the court in which the language is used. First National Bank v. Superior Court, 12 Cal. App. 335; Friedlander v. The Sumner Gold & Silver Mining Co., 61 Cal. 116; Sears v. Starbird, 75 Cal. 91. Moreover, where one has used language which amounts to a contempt of court, punishment is not meted out for thepurpose of vindicat ing the authority and dignity either of the judge in whose court the contempt occurs, or the judge who may have been referred to by the language employed, but rather for the purpose of vindicating the authority and dignity of the people as represented by their judicial tribunals. A contempt is not deemed as having been committed against the judge, as a person, but rather as against the court, as a tribunal of the people. People v. McDonald, 314 Ill. 548.

Respondent contends further that before he may be considered guilty of criminal contempt of court, it must not only be shown that the language he used was untrue, but that by its use he intended wilfully to assail the dignity

of the court. In support of this contention a number of cases are called to our attention, which, in our opinion are not in point. They involved charges of contempt involving language alleged to have been false, and the contempt contended for in thoses cases was alleged to have been an effort to mislead the court by means of such false statements. In such a case, of course, it must be shown, not only that the statements made were untrue, but that the one accused of making them knew they were untrue, and nevertheless was making them with an intent to and with the purpose of, misleading the court. No such situation is presented here.

Respondent further contends that even if it may be said that his language amounted to a contempt of court, he should be considered as having purged himself of such contempt, by a disavowal of the language. Presumably counsel refers to his request for leave to withdraw his petition. In the first place, such a request does not amount to a disavowal, and in the next place, the language involved in the petition which correspondent filed is not such as he may escape the effect of, by a disavowal. We agree with and adopt the language used by thecourt in the case of In re Wooley, 74 Ky. 95, in which the court said: "We recognize, to the utmost reasonable limit of its application, the rule that a supposed contempt consisting in mere words, which are apparently intended to be scandalous and offensive, but which are at all susceptible of a different construction, may be explained or construed by the speaker or writer, and that upon his sworn disavowal of an intention tocommit a contempt, proceedings against him must at once be

of the court. In support of this contention a number of cases are cited to our attention, which, in our opinion are not in point. They involved charges of contempt involving language alleged to have been false, and the contempt contended for in those cases was alleged to have been an effort to mislead the court by means of such false statements. In such a case, of course, it must be shown, not only that the statements made were untrue, but that the one accused of making them knew they were untrue, and the purpose of, misleading the court. No such situation is presented here.

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dismissed. But this rule does not control where the matter spoken or written is of itself necessarily offensive and insulting. In such a case the disavowal of an intention to commit a contempt may tend to excuse, but it cannot and will not justify the act. (The People v. Freer, 1 Caines, 484.)"

In the case of McCormick v. Sheridan, Supra, a lawyer in a petition for rehearing filed in court, used language very similar to that involved the case at bar, saying that "A more disingenuous and misleading statement of the evidence, it seems to us, could not well be made than this," meaning the one which the court had incorporated in its opinion. It was then alleged that the statement of the evidence, as made by the court, was "untrue and entirely unwarranted by the facts shown in the testimony," and that the court had made "a remarkable perversion of law applied to conceded facts of record," to reach the decision which "it seems to us to be a travesty of the evidence and uncontradicted testimony." Of such language the court pointed out that it was "too plain and direct in its imputation of negligence and bad faith to authorize us in taking the disavowal of the defendant as sufficient to purge him of contempt." On this same question in the case of In re Chadwick, 109 Mich. 588, the court said: "Where the language is susceptible of two interpretations or constructions, and the party charged asserts under oath that he did not intend the article to be construed as alleged in the innuendoes, he is purged of the contempt; but if the publi tion is fairly susceptible of but one construction, and its purport is to defame and degrade the court in the eyes of litigants and the public, his denial of any intended wrong does not operate to purge him of the contempt. People v. Wil

64 Ill. 195; Fishback v. State, 131 Ind. 304; Sturoc's case, 48 N. H. 428; In re Wooley, supra." In the case of People v. Wilson, 64 Ill. 195, it was held that the meaning and intent of a respondent must be determined by a fair interpretation of the language used by him. The contempt involved in that case was, unlike that involved in the case at bar, an indirect contempt, and the court held that it would not be accepted as a reason for discharging the rule to show cause, in such a case, that the respondent disclaimed in his answer any intentional disrespect to the court or any design to embarrass the administration of justice.

We regret that we find ourselves under the necessity of pointing out that, in his brief filed in this court, the respondent has repeatedly misquoted the law. At one point in his brief counsel purports to make a lengthy quotation from the opinion of Mr. Justice Breese, in Stuart v. The People, 4 Ill. 395, as it appears on page 404. The purported quotation which appears in respondent's brief, is in part respondent's apparent paraphrase of what Mr. Justice Breese said. Parts of the opinion of the court, which respondent purports to quote in his brief, are entirely omitted, without any indication that such is the fact, with the result that the quotation which respondent represents in his brief he has taken from the decision, is not a quotation at all. When the quotation as made, is read as a continuous statement, with the omitted parts left out and with respondent's own paraphrases here and there, in some places it does not change the meaning of the opinion of the court, as it appears in the report, but in other places the meaning is changed. In the same way counsel purports to include in his brief an extended quotation from

v. Wilson, 84 III. 195; it was held that the wording the
42 N.W. 498; In re Bailey, supra." In the case of Jacobs
84 III. 196; Lindsay v. State, 121 Ind. 504; Hanson's Appeal,

another leading Illinois case, Storey v. The People, 79 Ill. 45, and he has taken the same liberties with this quotation that he did with the one last referred to; and the same is true of several other quotations which he purports to include im his brief, one of them being from the opinion of this court in The People v. Richman, 223 Ill. App. 639. We can conceive of no legitimate excuse for such a course. It is quite impossible for a court to have any confidence in such a brief.

For the reasons given, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

201 - 31080

L. K. KNIGHT,
Appellee,
v.
JOSEPH TLAPA,
Appellant.

243 I.A. 612

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Nov. 17, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Knight brought this action of trespass on the case against the defendant, Tlapa, to recover damages suffered by the plaintiff when his automobile was run into by another automobile, owned and driven by the defendant. The plaintiff's declaration consisted of several counts, in some of which the plaintiff alleged he had been damaged, in and about the repairing of his automobile, and for the loss of its use during the time it was being repaired, and in others he alleged that the damages caused to his automobile, when the defendant collided with it, were such as to render it worthless. In one of the counts of the plaintiff's declaration he charged wilfull and wanton negligence on the part of the defendant. The defendant filed a plea of the general issue. The case was tried before a jury and a verdict was returned in favor of the plaintiff, assessing his damages at the sum of $2200. Later the plaintiff remitted $400 from the amount of the verdict and the court thereupon entered judgment against the defendant for $1800. To reverse that judgment

SOL - SIGNS

L. K. HAIGHT,

Appellee,

v.

JOSEPH VIAVA,

Appellant.

2431.A. 612

APPEAL FROM

SUPREME COURT,

COOK COUNTY.

Opinion filed Nov. 17, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Haight brought this action of trespass on the case against the defendant, Viava, to recover damages sustained by the plaintiff when his automobile was run into by another automobile, owned and driven by the defendant. The plaintiff's declaration consisted of several counts, in some of which the plaintiff alleged he had been damaged, in and about the repairing of his automobile, and for the loss of its use during the time it was being repaired, and in others he alleged that the damages accrued to his automobile, when the defendant collided with it, were such as to render it worthless. In one of the counts of the plaintiff's declaration he charged wilful and wanton negligence on the part of the defendant. The defendant filed a plea of the general issue. The case was tried before a jury and a verdict was returned in favor of the plaintiff, assessing his damages at the sum of $2500. Later the plaintiff remitted $400 from the amount of the verdict and the court thereupon entered judgment against the defendant for $2100. To reverse that judgment

the defendant has perfected the appeal.

It is first contended by the defendant that the verdict andjudgment are against the manifest weight of the evidence, and in that connection the defendant urges that the evidence clearly shows that the speed at which he was driving his car at the time of the collision with plaintiff's car, was not the proximate cause of the collision. This occurrence happened at about four o'clock in the afternoon on November 24, 1925, on Fillmore avenue in the Village of Oak Park. Fillmore avenue is an east and west street. The plaintiff's residence is located on the southwest corner of that street and Taylor avenue, a north and south street. At the rear end of the plaintiff's lot, bordering on a north and south alley, running south from Fillmore avenue, is a garage in which the plaintiff kept his automobile. The door of the garage was on the north side and the driveway from the garage extended north into Fillmore avenue. The first north and south street west of Taylor avenue is Lombard avenue and the next is Harvey avenue. The evidence shows that the plaintiff had backed his car out of his garage on to the driveway,and he had been doing some work upon it as it stood in the driveway with the rear of the car several feet south of the south curb of Fillmore avenue. He testified that he had occasion to step into his garage for a screw-driver and while in the garage he heard a "roar" and hurried to the door and looked west and saw two automobiles approaching. They were then just east of Harvey avenue, a block and a half west of where the plaintiff was standing. In his testimony the plaintiff described the approach of these cars by saying

the defendant has perfected the appeal.

It is first contended by the defendant that the verdict and judgment are against the manifest weight of the evidence, and in that connection the defendant urges that the evidence clearly shows that the speed at which he was driving his car at the time of the collision with plaintiff's car, was not the proximate cause of the collision. This occurrence happened at about four o'clock in the afternoon on November 24, 1928, on Fillmore avenue in the village of Oak Park. Fillmore avenue is an east and west street. The plaintiff's residence is located on the southwest corner of first street and Taylor avenue, a north and south street. As the west end of the plaintiff's lot, bordering on a north and south alley, running south from Fillmore avenue, is a garage in which the plaintiff kept his automobile. The door of the garage was on the north side and the driveway from the garage extended north into Fillmore avenue. The first north and south street west of Taylor avenue is Lombard avenue and the next is Harvey avenue. The evidence shows that the plaintiff had backed his car out of his garage on to the driveway, and he had been doing some work upon it as it stood in the driveway with the rear of the car several feet south of the south curb of Fillmore avenue. He testified that he had occasion to step into his garage for a screw-driver and while in the garage he heard a "pop" and hurried to the door and looked west and saw two automobiles approaching. They were then just west of Harvey avenue, a block and a half west of where the plaintiff was standing. In his testimony

that they were wabbling from one side to the other taking up the entire road. First one fellow went ahead and then the other fellow went ahead. When these cars got within say fifty to seventy-five feet of me (other evidence in the record shows that it was nearer fifty than seventy-five feet) the fellow on the inside (defendant) jumped the curb and ran clear away over the lawn of my neighbor's residence directly west of me, on across the alley and kept going in there until he hit my car," knocking the latter against a tree four or five feet to the east. The plaintiff testified that after the defendant's car had run up over the curb his wheels were up on the lawn or driveway about three or four feet. He said these cars were traveling fifty miles an hour, and also that he observed the defendant after the accident and that he was in an intoxicated condition. At the time of the trial the plaintiff's car was in his garage in the same condition in which it was after the collision.

One Bruce and his wife were driving north in Lombard avenue, just coming to Fillmore avenue and at the time the defendant's car and the other car above referred to went by on Fillmore avenue, Bruce and his wife were about fifty feet south of the corner. Bruce testified that the cars were going fifty to sixty miles an hour. His wife testified that they passed "at an awful rate of speed * * * They were going awful fast." When they got to the corner, this car had jumped the curb and crashed into the plaintiff's car as it stood in his driveway in front of his garage. Bruce testified that he talked with the defendant after the collision and smelled his breath and that it smelled like liquor to him. The plaintiff said

that they were "nobbling from one side to the other testing up the entire road. First one fellow went ahead and then the other fellow went ahead. When these cars got within any fifty to seventy-five feet of me they swirved in the road shows that it was nearer fifty than seventy-five feet) the fellow on the inside (defendant) jumped the curb and ran clear away over the lawn of my neighbor's residence directly west of me, on across the alley and kept going in there me- tit be bit my car," inserting the latter emphasis a true form or five feet to the east. The plaintiff testified that after the defendant's car had run up over the curb his wheels were on the lawn or driveway about three or four feet. He said these cars were traveling fifty miles an hour, and also that he observed the defendant after the accident and that he was in an intoxicated condition. At the time of the trial the plaintiff's car was in his garage in the same condition in which it was after the collision.

One Bruce and his wife were driving north in Leonard Avenue, just coming to Fillmore avenue and at the time the defendant's car and the other car above referred to went by on Fillmore avenue, Bruce and his wife were about fifty feet south of the corner. Bruce testified that the cars were going fifty to sixty miles an hour. His wife testified that they passed "at an awful rate of speed . . . They were going awful fast." When they got to the corner, this car had jumped the curb and in front of his garage. Bruce testified that he talked with the defendant after the collision and smelled his breath and that it smelled like liquor to him. The plaintiff was

the defendant staggered, but Bruce testified that he would not say that he staggered, but that he smelled liquor on him. Mrs. Bruce said he was intoxicated, - "I could smell liquor on him strong."

The evidence shows that at thetime of this occurrence the defendant had with him in his car his father and mother and also his wife and two children. When the cars collided the defendant's mother was thrown out and killed. Two policemen who arrived shortly after the collision and who removed the defendant's mother in an ambulance, testified as to the conditions they found present when they arrived. One of them testified the defendant was under the influence of liquor. He said he talked with the defendant,and among other things the Matter said that if he "had only known better it would not have happened," or something to that effect. The other of policemen said he did not notice anything about the defendant with reference to sobriety.

One Shaner, called by the plaintiff, testified that he saw two cars go by on Fillmore avenue when he was about 75 or 100 feet north of that street, on Lombard avenue, and that he thought they were going between 35 and 40 miles an hour. All the evidence shows that the defendant's car was one of these two automobiles bound east on Lombard avenue and that the other car was a Cadillac sedan, defendant's Buick being to the south and the Cadillac to the north, as they drove along in Lombard avenue. Shaner testified that as they passed Lombard avenue, the Cadillac was going faster than the Buick, - "trying to pass it. It was gaining on him considerably when I saw him." All the evidence shows that the plaintiff's

the defendant exaggerated, but Brown testified that he would not say that he exaggerated, but that he smelled liquor on him. Brown said he was intoxicated, - "I would smell liquor on his breath."

The evidence shows that at the time of this occurrence the defendant had with him in his car his father and mother and also his wife and two children. When the cars collided the defendant's mother was thrown out and killed. Two policemen who arrived shortly after the collision and who removed the defendant's mother in an ambulance, testified as to the condition they found present when they arrived. One of them testified the defendant was under the influence of liquor. He could be talked with the defendant,and among other things the latter said that it be "had only known better it would not have happened," or something to that effect. The other policeman said he did not notice anything about the defendant with reference to sobriety.

One Glover, called by the plaintiff, testified that he saw two cars go by on Fillmore avenue who he was about 75 or 100 feet north of that street, on Lombard avenue, and that he thought they were going between 35 and 40 miles an hour. All the evidence shows that the defendant's car was one of these two automobiles turned east on Lombard avenue and that the other car was a Cadillac sedan, defendant's Buick being to the south and the Cadillac to the north, as they drove along in Lombard avenue. Glover testified that as they passed Lombard avenue, the Cadillac was going faster than the Buick, - "trying to pass it. It was getting on his constantly when I saw him." All the evidence shows that the plaintiff's

car was badly smashed up.

For the defendant, One Correvont, who was standing with his wife and boy on the northeast corner of Fillmore avenue and Lombard avenue, testified that he saw these two cars coming east on Fillmore avenue, and when they reached him, "the car next to the curb (defendant's) tried to get away from him (the Cadillac) and at that time the front of the Cadillac was about a foot behind the front of the Buick being driven by the defendant; that when they got a little east of Lombard avenue, the Cadillac "started to put on the gas", and then the Cadillac "cut right in on this Buick and hooked his front wheel with the right rear wheel of the Cadillac * * * and the Buick went over the curb * * * and the Cadillac just missed the Moon (plaintiff's car) that was standing in this driveway, I should judge about a foot or so, and then he broke loose from him when he hit that curb across the alley." This witness testified that the Buick and the Cadillac were being driven between twenty and thirty miles an hour. He further testified that he talked with the defendant shortly after the accident, and he was not drunk. On cross-examination this witness admitted that in giving testimony at a corner's inquest he testified that as the cars approached Lombard avenue, the cut-out on the Cadillac was open and that "he (referring to the Cadillac) was playing along the way it looks to me. He was looking for a race. * * * The Cadillac ran ahead before he hit him. He was gaining, looking for a race, I guess. Of course naturally a Buick ain't got no business running alongside of a Cadillac." He further admitted that he testified on that former occasion, when asked how fast these cars were going when they passed him, "Well the Cadillac

car was badly smashed up.

For the defendant, the Corporal, who was standing with his wife and boy on the northeast corner of Fillmore avenue and Lombard avenue, testified that he saw these two cars coming east on Fillmore avenue, and when they reached him, "the car next to the curb (defendant's) tried to get away from him (the Cadillac) and at that time the front of the Cadillac was about a foot behind the front of the Buick being driven by the defendant; that when they got a little east of Lombard avenue, the Cadillac "started to put on the gas", and then the Cadillac "cut right in on this Buick and hooked his front wheel with the right rear wheel of the Cadillac * * *" and the Buick went over the curb * * * and the Cadillac just missed the boys (plaintiff's car) that was standing in this driveway. I should judge about a foot or so, and then he broke loose from him when he hit that curb across the alley." This witness testified that the Buick and the Cadillac were being driven between twenty and thirty miles an hour. He further testified that he talked with the defendant shortly after the accident, and he was not drunk. On cross-examination this witness admitted that in giving testimony at a coroner's inquest he testified that as the cars approached Lombard avenue, the cut-out on the Cadillac was open and that "he (referring to the Cadillac) was playing along the way it looks to me. He was looking for a race, * * * The Cadillac ran ahead before he hit him. He was waiting, looking for a race, I guess. Of course naturally a Buick ain't got no business running alongside of a Cadillac." He further admitted that he testified on that former occasion, when asked how fast these cars were going when they passed him, "well the Cadillac

was speeding fifty I guess. All of fifty when he went past that Buick, I know that;" and that when he was asked how fast the Buick was going he said he "should judge it was exceeding the limit all right, I couldn't say exactly how fast. He was exceeding over the limit just a little." The wife of the witness just referred to gave testimony similar to that of her husband, saying that when the cars passed "Fillmore street (apparently meaning Lombard avenue) the Cadillac got so close to the Buick it was forced over the curb." She testified she did not talk to the defendant after the collision but she was near him in the crowd and he was drunk. On cross-examination she testified that she first saw the cars when they were about two blocks west from where she was standing and that at that time she noticed something unusual about them, in that the Buick was forced over toward the curb. This was before they reached Lombard avenue. According to her testimony they then swerved out away from the curb and continued down the street toward the point where she was standing, and when they got east of Lombard avenue the Buick was forced over to the right again. That was the occasion when it went up over the curb and collided with the plaintiff's car. She testified, "They were not going very slow, but they were not going very fast."

The plaintiff was called in rebuttal and testified that he had called to see the witness Correvont with reference to his coming to court to testify and that on that occasion Correvont told him the other side had asked him to testify for them, but that he didn't sknow enough to be of any service to them, and then Correvont added that "he wasn't any five or ten dollar a day man." Correvont then returned to the witness

"They were not going along, but they were not going very fast."

The plaintiff was called in rebuttal and testified that he had called to and the witness Dorrevant with reference to the coming to county to testify and that on that occasion Dorrevant told him the other side had asked him to testify for them, but that he didn't think enough to be of any material use, and then Dorrevant added that "he wasn't any time or other," and then Dorrevant denied that he had ever told the plaintiff's counsel (previously mentioned) the defendant got no close to the truck it was forced over the curb." She testified that she did not tell to the defendant after the collision but she was near him in the crowd and he was drunk. On cross-examination she testified that she first saw the cars when they were about two blocks west from where she was standing and that at that time she noticed something unusual about them. In that the truck was forced over toward the curb. This was before they reached Lombard avenue. According to her testimony they then swerved out away from the curb and continued down the street toward the point where she was standing, and when they got east of Lombard avenue the truck was forced over to the right again. That was the occasion when it went up over the curb and collided with the plaintiff's car. She testified

stand and denied plaintiff's testimony relating to this conversation., In connection with this matter counsel for the defendant contends that the record shows the plaintiff committed perjury in that he testified that he did not subpoena this witness, whereas, later in the trial one of the lawyers representing the plaintiff stated, "I will admit we subpoenaed him." The record, in our opinion, wholly fails to sustain this contention. In the abstract the plaintiff's testimony on this point reads: "I did not subpoena him, I do not know who did." When we turn to the record, however, it appears that the question counsel asked the plaintiff on cross-examination was "Did you personally serve a subpoena on him?" to which he answered, "No sir, I did not." The next question was: "Do you know who did?" and he then answered, "I do not, but I haveam idea who did, though." Counsel then dropped the matter. A few minutes later, when Correvont was on the stand, he testified that when the plaintiff came to see him he told him he was "going to be served with a subpoena." He was then asked if he was served with a subpoena and he said he was and that he could produce the subpoena which was at his home. Counsel for the plaintiff then said: "I will admit we subpoenaed him." It is difficult for us to appreciate how anyone could reasonably contend on that record that the testimony given by the plaintiff on this point was untrue or amounted to perjury.

The defendant testified that the point where he first came into contact with the Cadillac was where Fillmore avenue crosses Ridgeland avenue. That was a block west of Harvey avenue. He testified that the Cadillac "started out and was following me right along. He was next to me. He

to perjury.

The defendant testified that the point where he first came into contact with the Cadillac was where Fillmore avenue crosses Highland avenue. That was a block west of Linden avenue. He testified that the meeting "started out

was running about 25 or 30 at the time the accident happened. That was all he was running at that time. He must have been running faster than I was, Thirty miles is as fast as I was running." The defendant also testified that the Cadillac drove "around east and I kept on going and he was crowding me to the curb, - so I thought he wanted to stop me, and I didn't stop still when he crowded me. I thought he would give me room again; so I thought he would let me go; so he give me room and I started up again and I kept going and going until he struck my hind axel with the bumper; so he throws my wheel out of my hand and throwed me over the curb." He was asked how fast he was driving when he first saw the Cadillac, and he answered: "I went kind of slow until we got together. I was driving about 20 miles an hour He was on the left side of the street, so I go ahead and slowed down again. So I thought he wanted to play with me or stop me or something, and afterwards he give me a little room. He just give his car a jerk unknowing and throw me on the curb. It hit the hub like it hit with a hammer and it knocked the hub right in." On cross-examination the defendant was asked whether it was not a fact that when he was testifying at the coroner's inquest he was asked "whether you were driving while you were intoxicated or drunk, and did you plead guilty and say you were?" He replied by asking: "What is that?" and he was then asked: "Isn't that what happened at the coroner's inquest?" and he answered, "Yes, that is what happened."

On that evidence we are of the opinion the jury were justified in concluding that at the time he ran up over the curb and collided with the plaintiff's automobile,

On that evidence we are of the opinion the jury were justified in considering that at the time he ran up over the ramp and collided with the plaintiff's motorcycle, he was running about 25 or 30 at the time the accident happened. That was all he was running at that time. He must have been running faster than I was, thirty miles is as fast as I was running." The defendant also testified that the Ogdilvie drove "around east and I kept on going and he was crowding me to the curb, - as I thought he wanted to stop me, and I didn't stop until when he crowded me. I thought he would give me room again; so I thought he would let me go; so he give me room and I started my again and I kept going and going until he struck my hind axel with the bumper; so he throwe myself out of my hand and throwed me over the curb." He was asked how fast he was driving when he first saw the Ogdilvie, and he answered; "I went kind of slow until we got together. I was driving about 30 miles an hour he was on the left side of the street, so I do speed and slowed down again. So I thought he wanted to play with me or stop me or something, and where the be give me a little room. He just give big out a jerk underneath and threw me on the curb. It hit the bub like it hit with a hammer and it knocked the bub right in." On cross-examination the defendant was asked whether it was not a fact that when he was testifying at the coroner's inquest he was asked "whether you were driving carefully and he answered, "Yes," that is what I said and he was then asked: "Isn't that what happened at the coroner's inquest?" and he answered "Yes" and he replied by saying: "What is that" and say you were" "while you were intoxicated or drunk" and did you plead guilty

the defendant was racing with the Cadillac, and we are further of the opinion that the evidence is such as to justify the conclusion that he was more or less under the influence of liquor. There may be said to be some conflict in the evidence on both of these questions. As it is apparent the jury awarded some exemplary damages, it would seem they reached an affirmative conclusion on one or both of these issues. On the evidence in the record this court could not say such a conclusion on the part of the jury was against the manifest weight of the evidence.

It is contended by the defendant in this connection that the collision of his car with the plaintiff's car was entirely due to the carlessness of the driver of the Cadillac and that the collision would not have happened if the Cadillac had not forced him over the curb and come in into violent contact with his car so as to force the wheel from his hands and result in his losing control. There is a good deal of conflict in the evidence as to just what happened immediately before the collision . There is no evidence in the record, which,in our opinion, would justify the conclusion that there was any such violent contact between the Cadillac and the defendant's car as to force the steering wheel from his hands and thus bring about a loss of control of his own car. Defendant contends that it may not reasonably be said, even if he was driving at an excessive rate of speed, that this was the proximate cause of the collision. It seems to be his contention that the manner in which he was driving his car was merely a condition which was present and which furnished the occasion for the operation of the other act, namely, the reckless

driving of the Cadillac, which latter act was the real cause of the collision. In support of this theory the defendant cites Jenkins v. La Salle County Coal Co., 364 Ill. 240; Hartnett v. Boston Store, 365 Ill. 331; Lerette v. Director General of Railroads, 306 Ill. 348; and Phillabaum v. L.E. & W. R. R. Co., 315 Ill. 131. In our opinion, all of those cases are clearly distinguishable on the facts involved from the case presented here. Statements which are general in character but which are made with reference to particular facts relating to the question of proximate cause may not at all apply to a situation involving quite different facts. It is true that if an alleged negligent act is a mere condition, which makes it possible for an accident to occur, but is in itself no part of the accident, such act may not be said to be the proximate cause of the accident, where some other negligent act was present, and operated together with the condition above referred to to bring about the accident. In such a situation it is always necessary to determine whether the negligent act alleged to have merely furnished a condition, was really that or whether it was not one of the direct and proximate causes, contributing with another like cause or causes, to produce the accident.

In this case the question of whether the speed of the defendant's car and the manner in which he drove it, was a direct contributing cause of its collision with the plaintiff's car, and thus was a proximate cause of the resulting damage, was a question of fact for the jury. Heiting v. C. R. I. & P. Ry. Co., 252 Ill. 466. The parties so regarded it and the jury was fully instructed on that question. Indeed some of the instructions submitted by the defendant and given

driving of the Cadillac, which latter act was the real cause of the collision. In support of this theory the defendants cite Jenkins v. La Salle County Coal Co., 204 Ill. 240; Parfrett v. Austin Lbr. Co., 208 Ill. 421; Lavette v. Director General of Railroads, 208 Ill. 548; and Pittsburgh v. C.C. & N. R. Co., 218 Ill. 181. In our opinion, all of these cases are clearly distinguishable on the facts involved from the case presented here. Expressions which are quoted in opinions but which are made with reference to particular facts relating to the question of proximate cause may not at all apply to a situation involving quite different facts. It is true that if an alleged negligent act is a mere condition, which makes it possible for an accident to occur, but in no part of the accident, such act may not be said to be the proximate cause of the accident, there came other negligent act was present, and operated together with the condition above referred to to bring about the accident. In such a situation it is always necessary to determine whether the negligent act alleged to have merely furnished a condition, was really what or whether it was not one of the direct and proximate causes, contributing with another like cause or causes, to produce the accident.

In this case the question of whether the speed of the defendant's car and the manner in which he drove it, was a direct contributing cause of its collision with the plaintiff's car, and thus was a proximate cause of the resulting injuries, was a question of fact for the jury. Nolting v. C. I. & P. Ry. Co., 208 Ill. 466. The question so reserved it and the jury was fully instructed on that question. Having

by the court on this question, were more favorable to the defendant than they should have been, in our opinion. In returning a verdict finding the issues for the plaintiff, the jury necessarily found that the conduct of the defendant in driving his car as he did was a proximate cause of the collision. In our opinion it could not reasonably be said that such finding is against the manifest weight of the evidence.

The evidence being such as to support a finding that the defendant was racing his car down the street and that he was to some extent under the influence of liquor, we are further of the opinion the jury was warranted in awarding exemplary damages. Cutler v. Smith, 57 Ill. 252; Jasper v. Purnell, 67 Ill. 358; The Illinois & St. Louis R. R. Co. v. Cobb, 68 Ill. 53; The West Chicago Street Railway Co. v. Morrison, Adams & Allen Co., 160 Ill. 288; McKinzie v. Randolph, 357 S. W. 126; Kolb v. O'Brien, 86 Ill. 210; Consolidated Coal Co. v. Haenni, 146 Ill. 614.

The defendant further contends that the plaintiff failed to prove material allegations of any of the counts included in his declaration. In our opinion that contention is untenable. The plaintiff is entitled to recover if one count is sufficient and the proof supports that count. Scott v. The Parlin & Orendorff Co., 245 Ill. 460. The jury having awarded exemplary damages, the verdict must rest on the additional count which was the one alleging wanton conduct on the defendant's part. In our opinion the proof supports that count. Although the damages proven were less than those alleged, those proven are such as may be recovered under the allegations of that

by the court on this question, were more favorable to the defendant than they should have been, in our opinion. In returning a verdict finding the license for the plaintiff, the jury necessarily found that the weight of the defendant in driving his car as he did was a proximate cause of the collision. In our opinion it would not unreasonably be said that such finding is against the manifest weight of the evidence.

The evidence being such as to support a finding that the defendant was seeing his car down the street and that he was to some extent under the influence of liquor, we are further of the opinion the jury was warranted in awarding exemplary damages. Butler v. Smith, 87 Ill. 485; Jaquet v. Farrell, 87 Ill. 338; The Village & St. Louis I. R. Co. v. Webb, 88 Ill. 83; The Peoria Insurance Co. v. Morrison, Shaw & Allen Co., 100 Ill. 308; Mowinkle v. Woodcock, 327 S. W. 168; Zeib v. O'Brien, 88 Ill. 330; Consolidated Coal Co. v. Haggard, 146 Ill. 614.

The defendant further contends that the plaintiff failed to prove material allegations of any of the counts included in his declaration. In our opinion that contention is untenable. The plaintiff is entitled to recover if one count is sufficient and the proof supports that count. Smith v. The Dublin & Greenville R. R., 141 Ill. 641. The jury having awarded exemplary damages, the verdict must rest on the additional count which was the one alleging wanton conduct on the defendant's part. In our opinion the proof supports that count. Although the damages given were less than those alleged, those proven are such as may be recovered under the allegations of that

count as to damages, which were to the effect that his car had become worthless as a result of the collision. The evidence submitted in behalf of the plaintiff showed that the car was still in his garage in the condition in which it was immediately after the collision. It further showed that the car could be repaired and that it would cost approximately $625 to repair it; that he had paid $1575 for the car, two or three weeks before it was damaged in this collision, buying it as a second hand car; that it was worth that amount at the time of the collision, and that a car damaged as this one was, and repaired at the cost above mentioned, would be worth from $900 to $1,000. No testimony was submitted on the question of how long it would take to repair the car, or on the question of the value of its use during that time. That element would, therefore, have to be disregarded in determining the damages. We are of the opinion that the proof above referred to, under the allegations to which we have called attention, would justify an award of $625, plus the difference between the value of the car before the accident - $1575,- and what the evidence shows it would be worth after being repaired, which we must consider $1,000; - such difference being $575, making in all, $1200. The jury returned a verdict for $2200, therefore $1,000 of the verdict must be considered punitive damages. Apparently the trial court considered that more than was justifiable, and required the plaintiff to remit $400, which was done. Whereupon, the court entered judgment for $1800. As the judgment now stands $600 must be considered as punitive damages. In our opinion, that is entirely justified by the evidence.

The defendant makes the further contention that the

justified by the evidence.

The defendant makes the further contention that the
award of $1500 for punitive damages, in our opinion, is entirely
unjustified and excessive as a punitive award. In our opinion, there is
for $1500. We feel judgment for plaintiff should be considered
$1500, which was done. Therefore, the court entered judgment
more than was justifiable, and required the plaintiff to remit
punitive damages. Ordinarily the trial court considered that
for $1500, therefore $1,000 of the verdict must be considered
being $2?, making in all, $1500. The jury returned a verdict
being repaired, which we must consider $7,000; - such difference
$1500.- and what the evidence shows it would be worth after
qualified statement, would justify an award of $500, plus the
above referred to, under the allegations on which we have
terminating the damages. We are of the opinion that the proof
that element would, therefore, have to be disregarded in con-
or on the question of the value of its use during that time.
the question of how long it would take to repair the car,
worth from $800 to $1,000. No testimony was submitted on
one use, and repaired at the cost above mentioned, would be
at the time of the collision, and that a car damaged as this
buying it as a second hand car; that it was worth that amount
two or three weeks before it was damaged in this collision,
mately $800 to repair it; that he had paid $1500 for the car,
ed that the car could be repaired and that it would cost approxi-
which it was immediately after the collision. It further show-
that the car was still in his garage in the condition in
The evidence submitted in behalf of the plaintiff showed
car had become worthless as a result of the collision.
count on to damages, which were to the effect that his

trial court erred in connection with the giving of the instructions. As to the first two submitted by the plaintiff and given by the court, complaint is made that in the giving of them the court erred in telling the jury what they "should take into consideration," in determining where the preponderance of the evidence was in the case; and also in unduly emphasizing a direction to exercise "your own common observation and experience as men in the affairs of life." The contention is that the instructions laid such stress on the latter element as to tell the jury that this was the "sole standard" for determining the question of preponderance of the evidence. In our opinion, no such meaning may reasonably be given the instructions. The jury are clearly told to consider all the evidence "in the light of" their common observation and experience in the affairs of life. The use of the word "should" in these instructions could not be said to have prejudiced the defendant. Posch v. Chicago Rys. Co., 221 Ill. App. 241. Moreover, we are of the opinion that where an instruction recites the proper elements to be taken into consideration by a jury, in determining where the preponderance of the evidence lies, it is not only permissible but proper, to tell the jury that in considering that question they should take them all into consideration. Such an instruction was involved in the case of Meyer v. Mead, 83 Ill. 19, where the jury were told that in determining the preponderance of the evidence they "must" take into consideration the elements that were enumerated, and it was held the instruction was not objectionable.

Complaint is also made of an instruction referred to as Plaintiff's Instruction 4, wherein the court told the

jury that if they believed from the evidence, that the defendant was guilty of wanton and wilful conduct at the time and place in question, "as charged in the additional count of plaintiff's declaration" and that such conduct, if any, resulted in damage to the plaintiff, and if they further believed that justice and the public good demanded it, then, under the law, they were not confined in their verdict to the actual damages proven, if any, "but they may give exemplary damages, not only to compensate the plaintiff but to punish the defendant and to deter others from the commission of like offenses." That was a correct statement of the law as will be seen by reference to the cases we have already referred to on that subject. For the reasons already given we are of the opinion the evidence was sufficient to justify the giving of this instruction. The fact that the instruction made such reference as it did to the additional count of the plaintiff's declaration, did no harm. In connection with the argument presented on this instruction defendant contends that "the mere fact, if it be true, that defendant was driving at an excessive rate of speed, would not make his conduct wilful or wanton and malicious." The fact of the excessive speed, in and of itself, would not, as a matter of law, establish wilful and wanton negligence, but it was for the jury to determine, as a question of fact, on the whole evidence, whether the conduct of the defendant was so reckless as to amount to wilful and wanton negligence. If they found that it was then they might properly take that fact into consideration in awarding damages, and on that question this instruction correctly advised them. Defendant complains that this was the only instruction given the jury on the question of damages. That, of course, may not

cause the giving of this instruction to be error. The fact that other instructions on the subject of damages were not given may not be charged against the plaintiff. No complaint is made that any instructions on this subject, submitted by the defendant, were refused.

Defendant's objection to plaintiff's instruction 5, which covered the question of the meaning of the term wilful and wanton conduct, on the ground that there was no evidence to warrant the giving of such an instruction, is without merit, for reasons we have already referred to. Plaintiff's Instruction 6, of which defendant also complains, was proper for the same reasons we have expressed in connection with what we have had to say on the question of Instruction 1.

Plaintiff's Instruction 7 told the jury that while he must prove his case by a preponderanceof the evidence, still the proof need not be by the direct evidence of a witness, but facts may also be proved by circumstantial evidence. In our opinion the evidence was such as to warrant the giving of this instruction. For example, there were some elements in the evidence, of a circumstantial nature purely, which bore on the question of whether or not the defendant was under the influence of liquor when the accident happened. As to this instruction as well as the 8th, which likewise referred to the fact that the burden of proof was upon the plaintiff to prove his case by a preponderance of the evidence, it is contended in behalf of the defendant, that he was prejudiced, in view of the fact that in one of the counts of the plaintiff's declaration he was specifically charged with driving his automobile while intoxicated "contrary to the statute in such cases made and provided," and that the

cause the giving of this instruction to be error. The fact that other instructions on the subject of damages were not given may not be charged against the plaintiff. No complaint is made that any instructions on this subject, submitted by the defendant, were refused.

Defendant's objection to plaintiff's instruction 6, which covered the question of the meaning of the term "right and wrong conduct", on the ground that there was no evidence to warrant the giving of such an instruction, is without merit, for reasons we have already referred to. Plaintiff's instruction 6, of which defendant also complains, was proper for the same reasons we have expressed in connection with what we have had to say on the question of instruction 1.

Plaintiff's instruction 7 told the jury that while he must prove his case by a preponderance of the evidence, still the proof need not be by the direct evidence of witness, but facts may also be proved by circumstantial evidence. In our opinion the evidence was such as to warrant the giving of this instruction. For example, there were some elements in the evidence, of a circumstantial nature, which bore on the question of whether or not the defendant was under the influence of liquor when the accident happened. As to this instrument a as well as the 6th, which likewise referred to the fact that the burden of proof was upon the plaintiff to prove his cause by a preponderance of the evidence, it is contended in behalf of the defendant, that he was prejudiced, in view of the fact that in one of the counts of the plaintiff's complaint he was specifically charged with driving his automobile while intoxicated "contrary to

provisions of the state statute on this subject constitute such conduct a crime, and therefore, the contention is made that in order to establish that count in the declaration, the burden imposed by the law upon the plaintiff was to prove the allegations made, beyond a reasonable doubt. In support of that contention the defendant has called our attention to the case of McInturff v. Insurance Co. of North America, 248 Ill. 82. That very case, however, further holds that where the party complaining of such an instruction as the one here in question "procured the trial court to declare the same rule, as to the quantity of proof required, as that laid down in the instruction complained of," he is not in a position to urge the point. "A party cannot complain of an error in instructions when the same error is found in the instructions offered by the complaining party. Springer v. City of Chicago, 135 Ill. 552." The very proposition of which the defendant now complains is contained in given Instruction 21, which was submitted by the defendant himself.

For the reasons stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

217 - 31036

FRANKLIN HARDIN,
Appellant,

v.

JAMES ADAMS,
Appellee.

243 I.A. 612

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Nov. 17, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the complainant, Hardin, seeks to reverse a decree of the Circuit Court of Cook County sustaining a demurrer interposed by the defendant, Adams, to his bill of complaint, and dismissing the bill for want of equity.

By his bill of complaint the complainant alleged that in 1911, a suit in equity was instituted in the names of Patrick K. Hardin and this complainant, purporting to be doing business as a co-partnership under the name of Hardin & Company, against the defendant Adams, the purpose of that suit being to foreclose a mechanic's lien; one Rogan appearing as solicitor for complainants in that suit; that Adams filed a cross bill, and that after a hearing on the issues formed by the pleadings in that case, a decree was entered in February, 1912, dismissing the bill of complaint for want of equity, and entering a decree against Patrick K. Hardin and the complainant here, and in favor of the cross-complainant in that suit, Adams, for the sum of $290.50. Complainant

Appellant,

Appellee.

Opinion filed Nov. 17, 1888.

JUSTICE MCCRARY delivered the opinion of the court.

By bill of complaint and claiming the bill for want of equity.

By bill of complaint the complainants alleged that in 1881, a suit in equity was instituted in the name of Patrick K. Martin and this complainant, pursuant to [illegible] co-partnership under the name of Martin & Company, against the Clermont Abbey, the patents of that being to foreclose a mechanic's lien; was begun [illegible] an application for complainants in that suit; that Adams filed a cross bill, and that after a hearing on the issues framed by the pleadings in that case, a decree was entered in February, 1883, dismissing the bill of complaint for want of equity, and entering a decree against Patrick K. Martin and the complainant here, and in favor of the cross-complainant in that suit, Adams, for the sum of $2831.50. Complainants

further alleged in his bill filed in the suit at bar, that in April, 1919, Adams instituted an action in debt, based on the decree entered inhis favor, as cross-complainant, as above stated; and that Patrick K. Hardin and this complainant were made parties defendant to that action; that on May 16, 1919, one Walker, an attorney at law, without the knowledge or consent of complainant, entered the appearance of the latter in that action in debt; that nearly two years later, in December 1920, a default was entered against Patrick K. Hardin and the complainant for want of a plea or pleas in the action in debt, and judgment was entered against them in that actionfor $1311.62. Complainant further alleged that he first learned that a decree had been entered against him in the mechanic's lien foreclosure suit, on or about October 24, 1924, when he was about to transfer title to certain real estate, and thatwhen this knowledge came to him he employed counsel who advised him that he was in a position to have the default and judgment, which had been entered against him in the action in debt, vacated and set aside; that on the date last above mentioned, through his then counsel, he filed a motion to set aside the default and vacate the judgment in the action in debt, in support of which motion he presented an affidavit, by the attorney at law, Walker, in which the latter stated that he had never filed the appearance of complainant or his own as complainant's attorney, in the action in debt, and had never authorized anyone else to do so, and that he did not represent complainant; that upon the presentation of this motion to the court, an order was entered setting aside the default which had been entered against the complainant in the action in debt, but

Thurber alleged in his bill filed in the suit at bar, that
in April, 1919, Adams instituted an action in debt, based
on the decree entered into here, an arbon-complainant,
as above stated; and that Patrick K. Murdin and this com-
plainant were made parties defendant to that action; that
on May 16, 1919, one Walker, an attorney at law, without
the knowledge or consent of complainant, entered the appearance
of the latter in that action in debt; that nearly two years
later, in December 1920, a default was entered against Patrick
K. Murdin and the complainant for want of a plea or pleas in
the action in debt, and judgment was entered against them
in that action for $1811.62. Complainant further alleged
that he first learned that a decree had been entered against
him in the academic like Thornbourne suit, on or about
October 26, 1920, when he was about to execute title to
certain real estate, and thereupon this knowledge came to
him he employed counsel who advised him that he was in a
position to have the default and judgment, which had been
entered against him in the action in debt, vacated and set
aside; that on the date last above mentioned, through his
then counsel, he filed a motion to set aside the default and
vacate the judgment in the action in debt, in support of
which motion he presented an affidavit, by the attorney at
law, Walker, in which the latter stated that he had never
filed the warrant of complainant or his own as complainant's
attorney, in the action in debt, and had never authorized
anyone else to do so, and that he did not represent complainant;
that upon the presentation of this motion to the court, an
order was entered setting aside the default which had been
entered against the complainant in the action in debt, and

allowing the judgment in that case to stand as security; that shortly thereafter, on November 13, 1924, complainant filed his appearance in the action in debt together with a plea. Complainant further alleged he had later been advised and had come to believe that he could obtain no relief in the action in debt, and that the judgment so recovered against him in the action in debt and allowed to stand, as already described, at the time the default was set aside and he was given leave to plead, would be confirmed and execution would issue thereunder and be levied against his property.

Complainant further alleged that he was never a partner with Patrick K. Hardin in the said firm of Hardin & Company, and never knew that his name was used in such connection at any time; that Patrick K. Hardin was for many years engaged in the construction business and during 1911 and 1912 complainant was employed by him, as a clerk, on a salary of $30 per week, and never received any of the profits of the firm of Hardin & Company, directly or indirectly, and that so far as he knew, Patrick K. Hardin was the only person connected with the firm known as Hardin & Company; that this complainant had no knowledge of the suit in equity instituted against Adams in 1911, to enforce a mechanic's lien, and that he never employed Rogan to represent him in any suit and that he never had any claim against Adams which could be made the basis of any such suit; that he never authorized Patrick K. Hardin to use his name in connection with the partnership known as Hardin & Company, or to employ Rogan in connection with any litigation at any time; and that in holding complainant out as a partner, without his knowledge and con-

sent, Patrick K. Hardin wilfully misrepresented the facts. Complainant further alleged in his bill of complaint that neither at the time of the commencement of the suit in equity to foreclose the mechanic's lien, was he indebted to Adams, nor was he now so indebted.

Assuming all the allegations of fact made in the bill of complaint to be true, as we must for the purposes of this decision, in view of the state of the record, the issue presented for the determination of this court is whether they stated a cause for relief in a court of equity. In our opinion they did. As we read the bill of complaint there was only one point which it might be said the complainant failed to cover adequately. While it might be taken, on the allegations of fact that are made in the bill of complaint, that the complainant not only was entirely ignorant of the decree which had been entered against him on the cross-bill, but also of the judgment which had been entered against him in the action at law in 1920, he does not specifically so allege. While complainant alleges that his appearance was entered in the action at law by the attorney-at-law, Walker, without his authority and without his knowledge, he does not allege specifically that he had not been served with a summons and that, in fact, he knew nothing about the existence of any such case. However, in view of the fact that counsel for the defendant, Adams, in the brief filed by him here, has in substance, admitted such to be the case, saying that in the action in debt, "summons was duly issued and service attempted to be made," and that "the Sheriff did serve the father" (Patrick K. Hardin), and that "an appearance was entered by an attorney for the appellee" (complainant), we are of the

opinion the bill should be held to be good as against general demurrer, and that the defendant should be required to plead.

The defendant makes the contention that the bill of complaint is subject to demurrer, in that it fails to set up such facts as would show that the complainant has a defense to the action at law. If the complainant alleged facts establishing that proposition, he would plead himself out of court. He admits that he has no defense to the action at law and that is his reason for coming into equity for relief. That such is the case, is further shown by the fact, stated by counsel for the defendant in the brief filed in this court, that after the filing of this bill, the action at law came on to be heard and resulted in a judgment in favor of the defendant here. In support of the contention referred to, defendant cites the cases of Colson v. Leitch, 110 Ill. 504, and Reed v. New York Exchange Bank, 230 Ill. 50. The situation presented in those cases was quite different from the one involved here. There a complainant had come into equity seeking to restrain the enforcement of a judgment which had been obtained in an action at law, alleging, that such judgment had been obtained although no service had ever been had against the complainant in such an action at law. It was held that before equity would give relief it was incumbent upon the complainant to allege that he had a defense which he could and would have interposed in the action, had he been given an opportunity to do so. It is quite apparent that in the situation presented here the complainant had no defense to the action in debt. That action was based upon the decree which had been entered in favor of Adams and against Hardin, in 1912. Complainant's case would

be made out in the action in debt, merely by establishing the entering of the decree, Hardin, under the facts alleged in his bill, could not gainsay the fact that the decree had been entered against him in the equity suit.

On the facts so pleaded, the decree was not void. The court had jurisdiction to enter it. In defense of the action in debt complainant could not show that the decree was erroneous or irregular in any particular not going to the jurisdiction. 33 Cyc. 1513. In the situation involved here, the bill of complaint, to be good as against demurrer, must set up facts showing that complainant had a good defense, not to the action at law, in debt, but to the cross-action of Adams in the former suit, in equity, in which the decree had been entered against this complainant in 1913. In our opinion, in his billof complaint he does allege facts which constitute an equitable defense which he should have an opportunity of interposing against any effort to collect the decree entered against him in 1913, and which is such as may only be availed of in a court of equity. If the fact was, as complainant now alleges that he was an employee of Patrick K. Hardin, as a clerk, and never had been a partner of his nor held himself out as such nor authorized Patrick K. Hardin to so hold him out; and never had any knowledge of the fact that he had done so; and if the suit in equity to foreclose a mechanic's lien against Adams was begun in the names of Patrick K. Hardin and this complainant, without any authority of complainant and without his knowledge, and if, as he alleges he never knew anything about that suit in equity until October 1924, when he attempted to convey title to a piece of real estate which was in his name, it would seem complainant had

alleged a case for equitable relief. In other words, although complainant apparently was not in a position to interpose a defense to the action in debt, by which the defendant Adams sought to revive the decree which had been entered in his favor, it further appears that complainant did have a defense as against the cross-bill, and that through no fault of complainant's he has never had an opportunity to present such defense. Whether complainant will be able to establish such defense, in fact, is of course another matter.

It is contended that complainant failed to show that he had been diligent, but that on the contrary, it appears on his own allegations that he was guilty of laches. With that contention we are unable to agree. According to the allegations of the complainant, knowledge of the situation first came to him on October 24, 1924. He immediately sought the advice of counsel, was advised that he could obtain the necessary relief by going into the action at law, which he immediately did. He succeeded in having the default which had been entered against him in that action set aside, the judgment to stand as security, and he filed a plea to the merits in that action. This was in November, 1924. Subsequently, but just when is not alleged, complainant was advised that it would be impossible to secure adequate relief by defending the action at law, but it would be necessary to go into a court of equity, which he did by filing his bill of complaint in this suit in June, 1925. Under all the circumstances, as we have hereinabove set them forth, we are of the opinion that it may not reasonably be

alleged a case for equitable relief. In other words,
although complainant apparently was not in a position to
interpose a defense to the action in debt, by which the
defendant Adams sought to revive the decree which had been
entered in his favor, it further appears that complain-
ant did have a defense as against the cross-bill, and that
through no fault of complainant's he has never had an
opportunity to present such defense. Whether complainant
will be able to establish such defense, in fact, is of
course another matter.

It is contended that complainant failed to
show that he had been diligent, but that on the contrary,
it appears on his own allegations that he was guilty of
laches. With that contention we are unable to agree.
Mr. Justice Harlan, speaking for the Court, said:
"The situation first came to him on October 26, 1886.
He immediately sought the advice of counsel, was advised
that he could obtain the necessary relief by going into the
action at law, which he immediately did. He succeeded in
having the default which had been entered against him in that
action set aside, the judgment to stand as security, and
he filed a plea to the merits in that action. This was in
November, 1886. Subsequently, but just when is not alleged,
complainant was advised that it would be impossible to secure
adequate relief by defending the action at law, but it would
be necessary to go into a court of equity, which he did
by filing his bill of complaint in this suit in June, 1888.
Under all the circumstances, we do not hesitate not then
[illegible] we are of the opinion that it may not reasonably be

said that the complainant was so lacking in diligence as to make his bill subject to demurrer, on the ground of laches.

For the reasons herein set forth, the decree of the Circuit Court is reversed and the cause is remanded to that court, with directions to overrule the demurrer.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

224 - 31043

JOY-TARBELL LUMBER COMPANY, a corp.,

Appellant,

v.

JAMES B. HALL,

Appellee.

243 I.A. 613

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 17, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action in assumpsit brought by the plaintiff Lumber Company against the defendant, Hall, who acted as the manager of the plaintiff's office at Seattle, for a period ending December 31, 1920, by which action the plaintiff sought to recover from Hall the sum of $6,845.74, which it had theretofore paid Hall in the form of commissions, the plaintiff's position being that the commissions he had received were in excess of those due him under the terms of the contract existing between the parties, to the extent of the sum sued for. The cause was submitted to thetrial court without a jury, resulting in a finding in favor of the defendant, and a judgment against the plaintiff for costs. To reverse that judgment the plaintiff has perfected this appeal.

The contract between the parties covered a period beginning November 1, 1919. It was in the form of a letter dated January 8, 1920, from the plaintiff to the defendant, which was marked "accepted", and signed by the defendant. This contract called for the payment of a sal-

243 I.A. 613

Appellee.

v.

Appellant.

Opinion filed Nov. 17, 1936.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action in assumpsit brought by the plaintiff Lumber Company against the defendant, Neil, who acted as the manager of the plaintiff's office at Seattle, for a period ending December 31, 1930, by which action the plaintiff sought to recover from Neil the sum of $8,865.74, which it had theretofore paid Neil in the form of commissions, the plaintiff's position being that the commissions he had received were in excess of those due him under the terms of the contract existing between the parties, to the extent of the sum sued for. The cause was submitted to the trial court without a jury, resulting in a finding in favor of the defendant, and a judgment against the plaintiff for costs. To reverse that judgment the plaintiff has perfected this appeal.

The contract between the parties covered a period beginning November 1, 1919. It was in the form of a letter dated January 6, 1920, from the plaintiff to the defendant, which was marked "accepted," and signed by the

ary of $300 a month to the defendant, and certain specified graduated percentages, "on the net earnings of the fir business, after deducting expense, which is figured on the cost to operate per thousand feet for the company. When this expense is deducted the net is arrived at and the profit is paid accordingly." It appears from the record that the defendant was in the general lumber business and that all the fir lumber business of the firm was done through the Seattle office. It also appears that near the end of 1920, the plaintiff received a total of $8,445.74, as the commissions due him under his contract with the plaintiff, for the period ending December 31, 1920. He received the last of this amount on that day. These payments were based on a figure of $3.05 as the cost of operation per thousand feet for the plaintiff company. Shortly before December 31, 1920, the defendant resigned as manager of the plaintiff's Seattle office, to take effect as early in 1921 as possible. The last check received by the defendant for commissions was issued from the Seattle office, under the defendant's direction and he advised the plaintiff that he had estimated the commissions on a basis of $3.05, although the plaintiff's own estimate of cost per thousand feet had been about $3.00, and he assured the plaintiff that he was "willing to make any slight adjustment after the actual figures are arrived at." This basis of figuring the defendant's commissions took no account of any Federal Income tax. The plaintiff had paid a Federal Income tax, as a corporation, in 1917, but had paid no such tax in 1918, 1919 or 1920, taking the position that no tax was due from it to the government as a corporation, inasmuch as it was a personal service corpora-

tion and such tax as was due the government under the income tax law by reason of the business of the plaintiff company, was due not from the corporation but from the individuals among whom the income was distributed, or in other words, the stockholders. In January or February, 1921, the United States Government, claiming that an income tax was due from the plaintiff as a corporation, called upon it for the payment of a tax for 1920, amounting to $61,731.06. The plaintiff paid approximately $46,000 of this amount to the government and made a claim for an abatement as to the balance, which was pending at the time the case at bar was heard. Thereupon, the plaintiff took the position that this amount which was demanded by the government as a corporate income tax for 1920, should be considered as part of the cost to operate per thousand feet which would raise that cost from something in the neighborhood of $3.00 to$4.835. This would make a difference in the commissions payable to the defendant for the period ending December 31,1920, equal to the amount here sued for. The defendant refusing to pay back that amount, to the plaintiff, this suit was instituted.

The language of this contract was the language of the plaintiff and it must therefore be strictly construed as against the plaintiff. The plaintiff contends that in construing the language of this contract with the defendant, it should be held that the payment of a corporation income tax was an item to be taken into consideration in figuring the net earnings on which the defendant's commissions were based. We are unable to agree with that contention. In support of its position the plaintiff relies upon the case

tion and such tax as was due the Government under the income
tax law by reason of the business of the plaintiff company.
was due not from the corporation but from the individuals
owned when the income was distributed, or in other words, the
stockholders. In January or February, 1921, the United
States Government, claiming that an income tax was due from
the plaintiff as a corporation, called upon it for the payment
of a tax for 1920, amounting to $21,721.06. The plaintiff
paid approximately $16,000 of this amount to the Government
and made a claim for an abatement as to the balance, which
was pending at the time the case at bar was heard. Thereupon, the plaintiff took the position that this amount which was demanded by the Government as a corporate income tax for 1920, should be considered as part of the cost to operate for that year which would make that cost less than computing in the manner fixed by the Government. This would make a difference in the computation payable to the defendant for the period ending December 31, 1920, equal to the amount here sued for. The defendant refusing to pay such amount, the plaintiff, this suit was instituted.

The language of this contract was the language of the plaintiff and it must therefore be strictly construed as against the plaintiff. The plaintiff contends that in construing the terms of this contract with the defendant, it should be held that the payment of a corporation income tax was not within the contemplation of the parties. To are unable to agree with that contention. In support of its position the plaintiff relies upon the case

of Neeson v. Sangamon County Mining Co., 318 Ill. 397. In that case Neeson was employed as a superintendent at a specified salary "plus 5 per cent of the net profits of the company." Nothing was said in the contract between the parties as to how the net profits should be arrived at. The court held that net profits meant "what shall remain, as clear gains of any business venture, after deducting the capital invested in the business, the expenditures incurred in its conduct, and the losses sustained in its prosecution;" and further, that the amount of an income tax paid by the corporation was necessarily an expense incurred in the prosecution of the business and it should therefore be considered in calculating the net profits of the business. The contract involved here provides that the percentage which the defendant is to receive in commissions is to be based on the net earnings of only a portion of the plaintiff's business, namely, the fir business. After so providing, the contract proceeds to say, in effect, that the net earnings of the fir business are to be arrived at by deducting the expenses, which expenses the contract says are to be figured on "the cost to operate per thousand feet for the Company." In our opinion, the expression "cost to operate per thousand feet" is not broad enough to include the matter of an annual corporation income tax, when it is shown that the corporation paid no such tax for several years prior to the time when the contract including this language was entered into, and contemplated paying none for the current year. If the parties had intended that "the cost to operate per thousand feet for the Company," was to

was to include any income tax the company might possibly be called upon to pay, they might easily have so specified in the contract. This they did not do.

In construing a contract, as was pointed out by our Supreme Court in Whalen v. Stephen, 193 Ill. 121, "courts will seek to discover and give effect to the intention of the parties so that the performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made. And greater regard is to behad to their clear intent than to any particular words which they may have used to express it. * * * In seeking to ascertain the intention, regard will also be had to the practical construction, if any, which the parties, by their acts have given to the contract," The evidence in the record shows that on a number of occasions in 1920, both the parties estimated "the cost to operate per thousand feet for the Company," and on that basis estimated the commissions to which the defendant was entitled. In August of that year the plaintiff's accountant estimated this cost to operate, by taking the company's gross profits anddeducting certain expenses, which, in the course of his testimony, he enumerated in detail. In making this estimate or computation at that time, he took no account of a corporation income tax. The record shows that under date of November 4, 1920, the plaintiff's president wrote the defendant a letter, telling him, among other things, that at a recent meeting of the board of directors it had been decided, if there was no objection on the defendant's part, that he should credit himself with the percentage of earnings which was due him as commissions, on

was to include any income tax the company might possibly be called upon to pay. They might easily have so specified in the contract. This they did not do.

In construing a contract, as was pointed out by our Supreme Court in Minden v. Stumpff, 186 Ill. 138, "courts will seek to discover and give effect to the intention of the parties as that the performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made. And greater regard is to be paid to their clear intent than to any particular words which they may have used to express it. * * * In seeking to ascertain the intention, regard will also be had to the practical construction, if any, which the parties, by their own conduct, have given to the contract." The evidence in the record shows that on a number of occasions in 1930, both the parties estimated 'its part to pay' for the Company," and on that basis estimated the cost of that year the plaintiff's assessment entered this case of that year the plaintiff's assessment entered this case to operate, by having the company's gross profits reduced- ing certain expenses, which, in the course of its business, be- tion at that time, be took no account of a corporation income tax. The record shows that under date of November 4, 1930, the plaintiff's president wrote the defendant a letter, telling him, among other things, that at a recent meeting of the board of directors it had been decided, if there was no objection on the defendant's part, that he should credit himself with the amount of earnings which was due him as commissions, on

the Seattle books and pay such commissions to himself out of the Seattle office, quarterly. Apparently up to that time none of these commissions had been paid to the defendant for that year, and in this letter the plaintiff's president told him that if, within the next few months, the Seattle office was in sufficient funds to take out all the commissions due him and not "crimp yourselves, it would be satisfactory to us for you to do it that way." He added that roughly the commissions then due the defendant had been estimated by the plaintiff to be about $5,000. That estimate was based on a cost to operate which took no account of any corporation income tax. In this letter, plaintiff's president offered to sell the defendant some of his stock in the plaintiff company for $5,000, which he suggested the defendant could pay for by authorizing him to have the amount necessary to pay for the stock, and which was due from the company to the defendant in commissions, charged against the defendant's account on the books of the company at the Chicago office, which amount could then be credited to the account of the plaintiff's president, and the latter would then send the defendant the certificates of stock involved. The plaintiff's president explained that he was doing this in an effort to raise some funds needed to meet a note of his.

Under date of November 9, 1920, the defendant wrote the president ofthe plaintiff company, accepting the proposition of the latter and authorizing him to have his account at the Chicago Office charged with $5,000. This was done and the defendant received the stock. In this letter of November 9, the defendant said that from the figures he had at the Seattle office, he computed the commissions due him at

the end of October, at "around $6,500." It will be seen that this computation took no account of a corporation income tax, as a part of the cost to operate per thousand feet. The president of the plaintiff company replied to the defendant under date of November 13, saying that when he mentioned $5,000 as the amount of the commissions due the defendant, he was only making an estimate, as he did not have the defendant's final report of October 31, in his possession at the time, and he added he had no reason to doubt the defendant's estimate of $6,500 was correct. On the same day, November 13, 1920, the president of the plaintiff company wrote the defendant another letter, referring to a quotation which had been made on some lumber to the Campbell's Creek Coal Company, using a figure of $3.00 as representing the plaintiff's overhead expense, and in the course of that letter he stated that the plaintiff's "overhead still remains at $3.00." The same statement was made by him in a letter to the defendant dated December 1, 1920. All of these estimates referred to in some places as overhead and in others as thecost to operate per thousand feet, took no account ofa corporation income tax. The company had paid no such tax for three years and apparently expected to pay none. In our opinion this correspondence shows without peradventure of a doubt that both parties were construing the language of that contract without any thought that it contemplated an item of income tax. That any other interpretation of the contract made a very material difference in the compensation the defendant was to receive from the plaintiff, is evident from the fact that it would make a difference of nearly $7,000 over the period in which the defendant would be

the end of October, at "around $8,000." It will be seen that this computation took no account of a corporation income tax, as a part of the cost to operate per thousand feet. The president of the plaintiff company replied to the defendant under date of November 13, saying that when he estimated $8,000 as the amount of the commissions due the defendant, he was only making an estimate, as he did not have the defendant's final report of October 31, in his possession at the time, and he added he had no reason to doubt the defendant's estimate of $8,000 was correct. On the same day, November 13, 1920, the president of the plaintiff company wrote the defendant another letter, referring to a quotation which had been made on some lumber to the Campbell's Creek Coal Company, using a figure of $3.00 'overhead still remains at $3.00." The same statement was made by him in a letter to the defendant dated December 1, 1920. All of these estimates referred to in some phrase or another and in others an attempt to operate per thousand feet, does no account ore conversation income tax. The company had paid no such tax for three years and especially excepted to his name. In one opinion this correspondence opens with the language of that contract without any thought that it and performance of a deeds that both parties were construing contemplated on the 12 James Inc. That any other interpretation of the contract made a very material difference in the consideration the defendant was to receive from the plaintiff, in evidence upon the fact that it would make a difference of nearly $2,000 even the basis in which the defendant would be

entitled to less than $8,500 in commissions, computing the cost to operate, as the testimony shows the parties were themselves computing it, all through the period of the defendant's service with the plaintiff company. At the meeting of the board of directors held in 1920, to which reference has been made, they took action on the question of salaries, and determined to continue them as they then were, for 1921. The president of the plaintiff company wrote the defendant a letter advising him of that action and when he replied to that letter the defendant expressed some disappointment. Plaintiff's president then wrote the defendant again and said, "We have aimed to fix the salaries on a fair basis for the services rendered and then let the bonus be the real answer, and when you total up your earnings for the year, I am sure that you can see what I mean." The bonus here referred to was the commissions to which the defendant was entitled on the net earnings of the fir business based on the cost to operate per thousand feet, which all through the period of the defendant's service and at the time of the writing of thelast letter referred to, had been computed without any reference to any corporate income tax.

The assistant manager of the plaintiff's Seattle office was a Miss Reeves. She testified by deposition that the cost per thousand feet on which the defendant's commissions were figured, "was $3.05 per thousand, which cost was determined from the Chicago office." She further testified that early in January, 1921, just after the defendant had resigned as manager of the plaintiff's Seattle office, the president of the plaintiff company came out there

and at that time "in discussing the business affairs of the Chicago office he said the commissions as drawn were correct if the income tax could not be deducted, and he did not know at that time whether it could or could not. He also said that had Mr. Hall remained with the company he would have made no objections to the commissions, but he was not going to have him leave the company and take out that amount of money." One Becker, manager of the plaintiff's Spokane office testified he had a talk with the president of the plaintiff company in the fall of 1930, in which the latter stated that at that time the commissions to which the defendant was entitled, from the plaintiff, were over $6,600, and that the defendant had authorized him to draw $5,000 of the amount that was due the defendant, to purchase that amount of stock in the company. Plaintiff's president denied this conversation with Becker, and also the one testified to by Miss Reeves.

In our opinion, any ambiguity or uncertainty that may be said to be involved in the language of the contract between these parties, is made entirely clear by the evidence of the practical construction which they themselves placed upon it, as indicated by the evidence to which we have referred. Under that construction, the defendant was entitled to all the commissions he received.

For the reasons we have given the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

172 - 30991

56/5a

BEN H. HARRIS,
Appellee,

vs.

PIGGLY WIGGLY STORES, INC.,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

243 I.A. 613

MR. PRESIDING JUSTICE McCURDY
DELIVERED THE O PINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries received while he was attempting to cross Wabash avenue at Harrison street, in Chicago, on the afternoon of June 21, 1921, when he was struck by a truck belonging to and operated by the defendant. Upon trial he had a verdict for $15,000, and from the judgment for this amount defendant appeals.

This is the second trial of this case. On a former appeal, 236 Ill. App. 392, we reversed the judgment and remanded the cause on the grounds that the third and fourth counts were insufficient to state a cause of action of wilful and wanton injury of plaintiff and for other reasons stated in the opinion.

The facts on the second trial are substantially the same as those proven on the first. Wabash avenue runs north and south and Harrison street crosses it running east and west. There are street car tracks on Wabash avenue; the easterly track is for northbound cars and the westerly track for southbound cars. There is an elevated railroad overhead, extending along Wabash avenue to the north, but curving towards the west into Harrison. This elevated railroad is supported by steel posts, one of which is 15 inches square above the base and stands four feet east of the east rail of the northbound track and four or five feet south of the north crosswalk on Wabash avenue. The streets in this section are in the

business district of Chicago and a police officer was stationed there to regulate traffic; one whistle was for north and south traffic and two for east and west traffic.

Considering the variant stories of the witnesses the jury could properly believe that when the plaintiff arrived at the northeast corner of Harrison and Wabash, the traffic was moving east and west; that plaintiff stepped off the curb onto the north cross-walk and looked in both directions. He says he saw nothing which would be likely to interfere with his crossing; that he proceeded to cross and had reached a point about two or three steps east of the east rail of the northbound track when the police officer blew his whistle once, which was a signal for the east and west traffic to halt and for the north and south traffic to proceed; that he then looked to the south but saw no vehicle coming across the intersection. It is a reasonable inference that the elevated railway post prevented a complete view to the south.

Defendant's truck was proceeding north on Wabash avenue in the northbound track about 80 feet south of Harrison at a rate of fifteen miles an hour. It slowed down when it reached Harrison, but after the whistle to proceed it continued northward, one witness said at twenty-five miles an hour; the police officer estimated it at ten miles an hour, and the driver of the truck placed the speed at twelve miles an hour. While plaintiff was proceeding westward and had stopped on the east rail he heard an auto horn and looking up saw defendant's truck about nine or ten feet away. He turned to the right to dodge it and step back, but was struck.

Plaintiff's second count charged that defendant negligently drove the truck at a high and excessive rate of speed, contrary to the statute concerning speed of motor vehicles.

Section 22 of the Motor Vehicle Law provides that a speed in excess of ten miles an hour in a closely built up business district of an incorporated city would be *prima facie* evidence that such vehicle was being operated at a speed greater than was reasonable and proper, having regard for the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person. There was evidence sufficient for the jury to find that the truck crossed the street intersection at a rate of speed in excess of ten miles an hour.

There were two men on the front seat of the truck - the driver and his helper - both servants of the defendant. The driver said he saw plaintiff moving on the crossing when he, the driver, was on the south side of Harrison street, but although he says his line of vision took in the whole street he did not see anybody crossing ahead of him; that after he saw the man that he thinks was the plaintiff he "paid no more attention." The helper on the truck testifies that he saw a man stepping off the curbstone or just about ready to step off, but did not pay much attention to him. When plaintiff was struck he was thrown or rolled twenty or twenty-five feet to the north and was unconscious. He was taken to the hospital, where he regained consciousness about eight o'clock that evening.

From these and other circumstances the jury could properly find that, while plaintiff was in the exercise of due caution and care for his own safety, he was struck and injured by reason of the negligent manner in which defendant's truck was operated by its driver.

It is strongly argued that defendant had the right of way, which the plaintiff was bound to respect, but it must be remembered that when the whistle was sounded for the north and south traffic to proceed plaintiff was well on his way across

Wabash. He was, in a sense, caught by possible northbound and southbound traffic and his actions for his own safety must be considered under these circumstances. It is wrong to assume that, when the signal is given for traffic to proceed, such traffic has paramount right of way regardless of the situation of others. Pedestrians should be given time to complete the street crossing or at least to reach a place of safety. We are in sympathy with the language of the court in Gillan v. Long, 232 Pa. 313, criticising the action of automobile drivers who, when the signal is given for them to proceed, "start their machines recklessly and rapidly regardless of persons already in the driveway, terrifying if not actually striking them. It is a common occurrence for people to narrowly escape injury because of such carelessness." It is incumbent upon drivers of automobiles at street intersections, regardless of signals which give them the right of way, to be exceedingly vigilant to have their cars under control so that they may stop at the slightest indication that there may be a collision. Responsibility must rest upon such drivers to so handle their cars as not to injure those already in the street.

On both trials plaintiff's damages were assessed at $5,000. Under such circumstances the reviewing court will not lightly set aside the verdict and should not do so unless it can say that the verdict is contrary to the manifest weight of the evidence. Stanton v. Chicago City Ry. Co., 205 Ill. App. 395; Ellis v. Danville Street Ry. & Light Co., 190 Ill. App. 486. There are many other cases holding that the fact that two juries have arrived at the same conclusion should have great weight with the reviewing court.

Able counsel for the defendant has made a microscopic examination of the proceedings upon the trial, but we do not think he discovered anything of sufficient importance to require a recital.

The X-rays testified to by Dr. Vaughan were properly admitted. They were taken under his directions and he was familiar with the machine. This witness testified as to the position in which plaintiff was placed when the films were taken and made a complete physical examination of the plaintiff and checked up the pictures; he testified that they were correct pictures of what they purported to show and that they properly portrayed the conditions. In Stevens v. Illinois Central R. R. Co., 306 Ill. 370, the witness testifying to the films did not testify that they correctly represented the conditions, nor did he state how the pictures were taken or that he had ever had any previous experience with an X-ray machine. "If the correctness of X-ray photographs is established by the testimony of the person making them, or if they are identified by the physician under whose general direction and for whose use they are made, who states that they are a correct picture of the condition, they are admissible in evidence." Ehrenheim v. Yellow Cab Co., 239 Ill. App. 403. Furthermore, there was no attempt made by the defendant to dispute the correctness of Dr. Vaughan's testimony as to what was shown by the pictures.

It is competent to show the salary received by plaintiff since his injury, and it was for the jury to judge of the weight of such testimony. C. A & E. R. R. Co. v. Keech, 163 Ill. 305; West Chicago Street R. R. Co. v. Dougherty, 209 Ill. 241.

There was no error in excluding the copy of the hospital record. Dr. Newman, who was asked to identify the copy, stated that he had no recollection of the occasion whatever, but that the copy looked like a hospital record. Neither did the witness state that he knew the things written on the copy were true when written. Even the original records have been held to be inadmissible under such circumstances. Wright v. Upson, 303 Ill. 120; Dorrance v. Dearborn Power Co., 233 Ill. 354; I.C.R.R.

Co. v. Sanders, 178 Ill. 585. In this case the absence of the original hospital record was not explained. Through some apparent misunderstanding it was missing, but there was no competent evidence of this which would justify the introduction of an alleged copy. Neither was there any evidence that the alleged copy was a true and correct copy of the original.

Strenuous complaint is made of comments and questions by the court, but considering the character of the trial we find nothing of serious importance.

Various other objections are made, both in connection with the introduction of the evidence and the examination of jurors, which are without merit.

It is said that instruction No. 2 is erroneous in that it fails to tell the jury that the second count alleges due care on the part of plaintiff prior to the accident. The instruction incorporates substantially the first count, which alleged that plaintiff "on the occasion in question ** was the and there, and prior thereto, in the exercise of ordinary care for his own safety." The second count alleges that "while the plaintiff was crossing the said intersection as aforesaid, and in the exercise of ordinary care for his own safety." The second count is not confined to the time the plaintiff was struck by the truck, but refers to all of the time while he was on the intersecting cross-walk. This would mean from the time he stepped off the curb. This instruction does not direct a verdict. It simply attempts to state the issues in the first and second counts, and nothing more.

It is also said to be error to give plaintiff's instruction No. 5, which left it optional with the jury to consider the number of witnesses testifying by using the word "may" instead of "must." This form of instruction has been approved

many times, and the use of the word "must" has been criticised. Lyons v. Chicago City Railway Co., 258 Ill. 75; DesPlaines v. Winkelman, 270 Ill. 149; Chicago Union Traction Co. v. Hamne, 228 Ill. 346.

The giving and refusing of other instructions are said to be prejudicial error, but taking the instructions as a series, which the jury were instructed to do, we cannot find anything therein which should work a reversal.

It is strongly argued that plaintiff adroitly retained the wilful and wanton counts in the case to the prejudice of the defendant. The record does not justify this claim. The court granted defendant's motion to take the wilful and wanton counts out of the case by marking the instructions to this effect as given. The fact that they were not read to the jury is not important. The case was tried upon the theory that contributory negligence of the plaintiff, if proved, was a sufficient defense, and the jury was so instructed. Furthermore, plaintiff by leave of court filed an additional count attempting to conform with the holding of this court as to the sufficiency of a wanton and wilful charge, but on defendant's motion at the close of the evidence this was eliminated.

By special pleas the defendant set up the defense that the plaintiff's injuries arose out of and in the course of his employment with the Chicago, Milwaukee & Gary Railroad Company, and hence the Workmen's Compensation Act applied. Plaintiff testified that before the accident he had been shopping with his wife at Lyon & Healy's store, where he had an appointment with her at four o'clock, and was with her for an hour or an hour and a quarter; that he walked down Michigan avenue and stopped at the Congress hotel for a few minutes to see if any of his personal friends were there. He was returning to his office, which was

located at Wells and Harrison streets, when the accident happened. There was no basis in the evidence upon which the jury would have been warranted in finding that plaintiff received injuries arising out of and in the course of his employment. Plaintiff left his office for a personal shopping expedition with his wife and was returning therefrom when injured. As was said in Harvester Co. v. Industrial Board, 282 Ill. 480, "it further appears that the trip deceased was making at the time of the accident was entirely unnecessary so far as the business of the company was concerned and one which was not authorized or expected by it." See also Dietzen Co. v. Industrial Board, 279 Ill. 11; Boorde v. Industrial Commission, 310 Ill. 62.

It is also claimed that the damages are excessive. The evidence tended to show that there was a double line of fracture starting on the left side of the skull in the frontal region, running downward through frontal sinus, from the left eye to the root of the nose. At the time of the trial the line of fracture was not yet closed. There was also a fracture behind the left ear. A physician was of the opinion that there had been an injury to the brain as a result of these fractures of the skull. Plaintiff was in the hospital nine days and a nurse from the hospital attended him while at home. Five ribs were fractured, with a possible fracture of two others. Plaintiff also was injured in the left arm and leg. A doctor testified that the results following the injury would probably be permanent.

The plaintiff was fifty-four years old at the time of the accident and was the vice-president and general manager of the Chicago, Milwaukee & Gary Railway Company at a salary of $9,000. There was a transfer of ownership of this railroad, and the new owners replaced old employes with new ones in many instances. Plaintiff subsequently became manager of a steamship company at a

salary which later became $5,000 a year.

Two juries have passed on the measure of damages and have arrived at the same result. Under such circumstances we cannot say that the amount of the verdict is excessive.

Upon the entire record, after giving due consideration to all the points made against the verdict, we do not feel justified in disturbing it, and the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

218 - 31037

V. G. TRUEBLOOD & CO.,
Appellee,

vs.

CHAS. H. WAGNER CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

243 I.A. 613

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the garnishee, Chas. H. Wagner Co., from a judgment against it for $113 and costs.

The garnishee was served with summons in a suit brought by Trueblood & Co. against E. C. Nobel, and in apt time filed an answer as follows:

"Said Chas. H. Wagner Co. (not inc.) answering says that there was nothing due from the Chas. H. Wagner Co. to said E. C. Nobel at the time said Trueblood & Co. served its garnishee notice upon the said Chas. H. Wagner Co.

"That on the contrary, the said E. C. Nobel, at the time of said service upon the Chas. H. Wagner Co. had overdrawn upon its account with the said Chas. H. Wagner Co., in the amount of forty one dollars; and that said E. C.Nobel is not now, never has been receiving any salary or wages from said Chas. H. Wagner Co., whereas said E. C. Nobel is not in direct employment with the Chas. H. Wagner Co. (not inc.), but said E. C. Nobel is on his own accord making sales for said Chas. H. Wagner Co. (not inc.) from time to time, for which sales said E. C. Nobel receives certain commissions upon completing actual sales, and that when earned and due, such commissions are paid over to E. C. Nobel by said Chas. H. Wagner Co. (not inc.) And further: throughout the whole month of August, and ever since this garnishee process against said Chas. H. Wagner Co., no monies have been or are, at any time due said E. C. Nobel by said Chas. H. Wagner Co. (not inc.)"

Subsequently, without notice to the garnishee, the answer was stricken for insufficiency and final judgment was ordered against the garnishee for default of answer. Due motions were made in proper time to vacate the judgment, which were denied.

The appellee does not appear in this court. No reason is presented justifying the court in striking the answer and none

occure to us why this should have been done.

It was error to enter final judgment. The proper practice on default of answer is to enter a conditional judgmeht and issue a scire facias against the garnishee. Sec. 8, Chapter 62, "Garnishment," Illinois Statutes.

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

268 - 31088

6217a

M. R. HERRMANN,
Appellee,

vs.

GENERAL LINSEED OIL COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 613

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, employed by defendant, alleged his wrongful discharge and claimed damages. Upon trial by a jury he had judgment for $2990, from which defendant appeals.

The contract of employment was written, dated March 1, 1921, whereby for a weekly wage of $75 and other considerations plaintiff agreed to give his services as a salesman to defendant for a period of two years, agreeing "to devote all his time, skill and energy for the benefit of the said business and is to engage in no other trade, or occupation, nor to do any other work for any other firm or corporation, or for himself, during the life of this agreement." He was discharged October 22, 1921, defendant claiming that he had violated the aforesaid agreement, and this issue of fact was submitted to the jury.

Plaintiff testified, in substance, that he observed faithfully his contractual obligations and did not sell any other goods for any other firm, competing or otherwise, during the life of the contract and that he has at all times been ready, willing and able to perform the services called for therein; that when he was discharged on October 22nd he was told that defendant could not use him any longer because he did not sell enough goods.

The defendant endeavored to show that plaintiff had violated his agreement to devote all his time, skill and energy

to defendant's business. One instance of this was said to be a sale of wall paper procured by plaintiff from a certain Benjamin Rabinovich to L. Klein & Company, in which plaintiff received a commission of $10. Plaintiff denied categorically that he made such a sale or was interested in the same, and Rabinovitch's testimony that he paid the plaintiff a commission was discredited by showing that at a former trial he testified that he did not think that a commission had been paid. A witness testified that plaintiff was interested in a sale of brushes and lead to one Guggenheim, but there were several circumstances tending to discredit this witness and plaintiff testified positively that he was not interested in nor had made any such sale. The defendant attempted to prove one or two other small matters which it is claimed violated plaintiff's undertaking, but the jury evidently accepted the positive statements of plaintiff rather than the somewhat uncertain testimony of defendant's witnesses.

The conclusion of the jury was based largely upon the credibility of the respective witnesses. It had the opportunity to observe their conduct and demeanor while testifying, and upon the record, which we have examined, we cannot say that the verdict as to the wrongful discharge of plaintiff was manifestly contrary to the weight of the evidence.

We find no prejudicial error in the rulings of the court upon the evidence.

Objections are made to certain given instructions. The abstract does not show at whose request these were given, nor does it show that these were all the instructions given, nor that there was any specific objections to the same. Under such circumstances we cannot say that such instructions should work a reversal.

We understand from the statement of one of the attorneys that this case has been tried three times. In the last trial con-

siderable feeling developed and there was much acrimonious talk by the attorneys. It was necessary for the court to admonish counsel repeatedly. We find no impropriety in anything said by the trial Judge in his attempts to have an orderly trial.

Plaintiff was unemployed from October 22, 1921, to December 3, 1921, when he obtained employment for fifty-six weeks at $50 a week. It is claimed that there is no evidence that plaintiff could not have bettered himself. Plaintiff testified that after he was discharged he called upon and wrote to several firms seeking employment and tried his best to get employment right away. It is sufficiently proven that plaintiff exercised reasonable diligence in procuring other employment. There was no evidence that he could have done better.

It is claimed that the damages of $2990 are excessive. We are unable to determine the basis upon which the jury fixed this amount. Plaintiff's contract was for a salary of $75 a week. Under the evidence he was entitled to six weeks period of unemployment, or $450. The difference between his contract salary of $75 a week and $50 a week, which he later received for a period of fifty-six weeks, would be $1400. The contract provided that plaintiff was given the privilege of purchasing five shares of treasury stock of the defendant company, provided the option was exercised within two years from the date of the contract. It was also agreed that plaintiff was to receive dividends on said five shares of stock in the event they were purchased by him, and "In the event that the said party of the second part (the plaintiff) will not purchase the said shares of stock at the end of two years, it is agreed that he shall be entitled to an amount equal to the dividends declared on the said five shares of stock, in a sum not less than $750.00 for the first year and whatever the dividends will be for the second year, which said sum shall be in addition to his weekly salary of $75.00

per week." We conclude that this means if plaintiff did not exercise his option to purchase the shares of stock he was to receive a bonus of $750 for the first year, in addition to his weekly salary of $75. Adding this to the previous items gives $2600. Plaintiff claims the difference of $390 between this and the judgment is accounted for by interest. No interest was claimed in the declaration nor upon the trial. There is nothing in the record to justify the allowance of interest.

For the above reasons the judgment should be affirmed except as to $390. If, therefore, the plaintiff will file a remittitur for $390 within ten days from the date of the filing of this opinion, the judgment will be affirmed for $2600; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR OF $390;
OTHERWISE REVERSED AND REMANDED.

Hatchett and Johnston, JJ., concur.

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280 - 31100

ANNA M. MOLLOY as Administratrix of the Estate of Loretta Molloy, Deceased,

Appellee,

vs.

CHICAGO RAPID TRANSIT COMPANY,

Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

243 I.A. 613

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks a reversal of an adverse judgment for $5500 in an action on the case for the wrongful death of Loretta Molloy.

A declaration of two counts was filed. The first count was withdrawn by the court from the consideration of the jury and the case went to trial on the second count, which alleged in substance that on December 21, 1923, defendant owned a certain double track elevated road extending in a general southerly and northerly direction, and a station platform at Lawrence avenue, which was on the west side of the northbound track of the railroad, the top of the platform being about on the level with the floors of the passenger cars; that defendant was a common carrier for hire; owning and controlling the railroad, station platform and stairways; that Loretta Molloy, a child of eight years of age, was upon the platform for the purpose and with the intention of boarding and becoming a passenger upon a northbound train, defendant having accepted her as a passenger when she paid her fare before she entered upon the platform; that defendant "wrongfully and negligently operated a certain car in said train when and while a perpendicular handhold at or near one end of said car extended out beyond the side of said car such an unnecessary, unusual and dangerous distance that it was liable and likely to strike or

280 - 31100

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280 - 31100

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or catch the clothing of persons while on said platform close to the side of said car for the purpose of boarding or alighting from said train;" that while the deceased was upon said platform for the purpose aforesaid and in the exercise of ordinary care for her own safety, considering her age, intelligence, capacity and experience, said handhold caught in her clothing and she was thrown down between the edge of the platform and the side of the car and from there fell to the track, receiving injuries from which she died.

There is little, if any, dispute as to the occurrence. A Mr. Dunlap testified that when he first got on the platform he saw deceased standing at the top of the stairway; that there was a wind-break, which extended north and south about the middle of the platform; that two ladies were standing between the wind-break and the edge of this platform about a foot or a foot and a half from the wind-break and about two feet from the edge of the platform; that when the train came alongside the platform the child started to run northward about opposite the front entrance of the second car; that when she reached those ladies she passed between them and the side of the train, and just at that instant she was struck by the front end of the second car and thrown backward, so that her back went flat against the side of the car and her body, except the head, fell between the platform and the car, and when it reached the intersection of the second and third cars it passed out of sight, dropping down across the rails. Another witness testified that "she appeared to come in contact with the handle of the door, ** It appeared that her coat got caught on the handle. ** It was her coat that came in contact with the handle bar, as it appeared to me. The handle bar projected out about two and a half inches from the body of the car." Another witness testified that he "noticed this little girl apparently hooked onto one of the coaches. ** She was being dragged. ** I did not

notice the child until I saw her hooked. I would say that she was hooked. I was fifty feet away. She was apparently endeavoring to keep her feet. She was in an angle against the car. The first general appearance of her to anyone would be that she was running, but after a second glance - a comprehensive glance - you could see that she was not running." The two women on the platform gave similar testimony.

It is agreed that the handle bar was south of the door at the front end of the car and extended at right angles from the body of the car two and a half inches, is two feet seven inches long, and reaches within one foot and ten inches of the platform.

From the testimony of these witnesses it is proven that, as the deceased was passing between the two women and the side of the train she was caught by and hooked onto the handhold and was carried along for some little distance while she was endeavoring to keep her feet. She then dropped through the space between the side of the car and the edge of the platform and hung suspended by her head until the second and third cars passed her, when she fell through to the track.

There was a sharp conflict between a witness for the plaintiff and one for the defendant touching the question whether the position of this handle bar was dangerous to persons on the platform, which could have been avoided consistently with the practical operation of the car and trains. The one witness for the defendant testified that some of these handholds extend at right angles from the side of the car, like the one in question, while others extend out diagonally at an angle of forty-five degrees from the side of the car; that there were three times as many in use with the handhold extending at a right angle as the other kind. The witness for the plaintiff testifying on this

subject said that there were four times as many cars in use equipped with the latter type of handholds as there were cars with handles at right angles. He said where "one car had the handle extended out, there were four that did not."

It is argued, first, that the court erred in refusing defendant's motion to find it not guilty. The rule applicable on such a motion has been stated many times. All that the evidence tends to prove and all just inferences to be drawn from it must be conceded to the plaintiff. If there is in the record any evidence from which the jury could, without acting unreasonably, find the material averments of the declaration had been proven, a verdict should not be directed. McGregor v. Reid, Murdoch & Co., 178 Ill. 464; Libby, McNeil & Libby v. Cook, 222 Ill. 206; Devine v. Delano, 272 Ill. 179; Shannon v. Nightingale, 321 Ill. 163.

There was evidence (to which we will refer later) tending to show that both the deceased and her mother were free from contributory negligence. There was also evidence tending to show that defendant in operating its cars with the projecting handle bars was guilty of negligence. All these were questions of fact which, under the rule above stated, were properly submitted to the jury.

Was the verdict manifestly against the weight of the evidence? We have already sufficiently referred to the evidence concerning the occurrence to indicate that the question of the negligence of the defendant was solely one of fact for the jury to determine. It is argued strongly that the jury had no right to disregard the evidence of defendant's witness tending to show that handles at right angles were a standard construction. This witness admitted that some of the cars were equipped with another type of handle which did not project straight out from the body of the car. He disagreed with plaintiff's witness only as to the number of such cars. We cannot say that under the circumstances present

a handle bar projecting at right angles two and a half inches is not dangerous. Reasonable minds would agree that a handle projecting a foot or more would be dangerous. How much less should it project for reasonable minds to agree that it is not dangerous? This must depend on the circumstances of each case. It was for the jury to consider the position of the handles, the fact that many cars had handles less extended, the distance between the platform and the cars while moving and standing, the fact that deceased's coat was caught by the handle, and all the other facts and circumstances present. We cannot say that the conclusion of the jury that the defendant was guilty of the negligence charged is clearly and manifestly against the weight of the evidence.

Whether or not the projecting handle bar was the proximate cause of the deceased's injuries and death was properly for the determination of the jury from all the circumstances. I. C. R. R. Co. v. Siler, 229 Ill., 390. If this accident was a natural consequence of the alleged negligence of defendant in maintaining such projecting handles and the same might have been foreseen by the defendant in the exercise of reasonable caution, it is responsible. Pullman Palace Car Co. v. Laack, 143 Ill. 260. It is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. City of Bloom v. Scott, 181 Ill. 116. If the consequences follow in unbroken sequence from the wrong to the injury without an interfering efficient cause, it is sufficient if the wrong-doer might by the exercise of ordinary care have foreseen that some injury might result from such wrong doing. I. C. R. R. Co. v. Siler, 229 Ill., 390.

As we have above said, the fact that many of defendant's cars were equipped with handles less extended, indicates

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As we have above said, the fact that many of defendant's cars were equipped with handles less extended, indicates

that defendant anticipated that some injury might result from the projecting handles. The injury in question did result from this cause, and the jury could properly find that the failure of the defendant in this respect was negligence which was the proximate cause of the accident and death of the deceased.

Was the deceased guilty of contributory negligence? At the time of the accident she was slightly over eight years old. Her mother testified that she was all right in her studies, an average girl; she was tall for her age. She had been accustomed once a week for ten or eleven weeks prior to this accident to board northbound elevated trains at this station when accompanied by an older sister. This was the first occasion that she was there unattended. Deceased evidently wished to board the train between the first and second cars. As this point of the train did not stop where she was first standing, she started to run so as to be in a position to board it at this point when it stopped. Her mother had instructed her to stand in the middle of the platform until the train pulled in. As she ran north she was confronted by the two women standing on the platform between the wind-break and the train. There was more space between the women and the train and she went by that path. Her conduct is not to be judged by the standards of an adult. The question of the negligence of a child between the ages of seven and fourteen years is a question of fact which must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child. Deming v. City, 321 Ill. 343. We cannot say that the jury's conclusion that her conduct in this respect was not contributory negligence was erroneous.

It is argued that the evidence fails to show that the mother, who is the administratrix, exercised ordinary care in the premises, citing Hazel v. Hoopeston-Danville Motor Bus Co., 310

Ill. 38, where it was held that in cases of this kind the evidence must affirmatively show that both the deceased persons and the next of kin exercised ordinary care. It has been well said, "The standard of/the care of the parent is not capable of being defined by law, but each case must depend on its own facts and circumstances." West Chicago St. Ry. Co. v. Liderman, 187 Ill. 463; Funk, Admr. v. Ratledge Bone Construction Co., 237 Ill. App. 625. The deceased's father and mother were the parents of six children at the time of the accident, ranging in age from five to twelve years; the father was a railway mail clerk away on his run on the day of the accident; the mother had no servants and did her own work. She testified regarding her reluctance to let the deceased go; that she feared danger from the traffic on the street and watched her until she passed where a traffic officer was stationed and which was the only street she had to cross on her way to the elevated station. She testified that in her judgment the deceased was able to take care of herself on that trip; that she gave her instructions as to her conduct on the platform and in boarding the train. In Wagner v. C. & A. R. R. Co., 265 Ill. 249, it was held that an error of judgment does not necessarily amount to negligence. We think the evidence shows that the mother exercised as much precaution as could be expected and as is usually observed by parents for their children. In any event we cannot say that the jury should manifestly have held otherwise.

Complaint is made of the admission of testimony of the witness Rea testifying as to the handle bars. It is said to be irrelevant and prejudicial, but in what respect is not made clear.

It is also objected that the plaintiff was permitted to testify as to conversation she had with the deceased at the time she was permitted to go on the trip in question. The mother's conduct with reference to her care at the time was an issue in the

case, as was the conduct of the deceased. The conversations, which included instructions given by the mother to the child with reference to the train she should take and her conduct on the platform, were material and relevant to the issue as to their conduct.

Complaint is made of the instructions which are referred to in the brief by number only. Instructions criticised should be set out in the brief. C. P. S. Co. v. L'Hommedieu, 228 Ill. App. 201.

Given instruction No. 4 for plaintiff is criticised as telling the jury that under certain circumstances the relation of common carrier and passenger existed between the deceased and the defendant, and consequently it owed her the duty of doing all that human care, vigilance and foresight could reasonably do under the circumstances in view of the character and mode of conveyance adopted to guard against injuries to passengers.

It is said that defendant did not owe deceased the duty of a common carrier to its passengers, which is required only when the passenger has boarded the car and does not obtain where the person is on the platform or stairways of the station, citing Davis v. South Side Elevated Ry. Co., 292 Ill. 378. That was a case where the alleged passenger had left the defendant's car, had passed through the station and reached the first landing of the stairs going to the street when she slipped on a banana skin and fell. The court held that under such circumstances the only degree of care required is the degree of care that would be required from the owner of the ordinary business house or concern. But this is not the instant case. Here, the deceased had paid her fare and was on the platform in the act of boarding the train. It has been frequently held that under such circumstances the person is a passenger, to whom the carrier owes the highest degree of care. C. & A. R. R. Co. v. Byrum, 153 Ill. 131, and cases there cited; also E.C. St. R. R. Co. v. Polkey, 203 Ill. 225; Feldman v. Chicago Ry. Co.

280 Ill. 25. In the Davis case, supra, the court recognized this rule in referring to Illinois cases where the highest degree of care was required by saying: "In all these cases it is clear that the accidents happened in boarding or alighting from trains or in the course of their moving, and the reason for the highest degree of care in these cases was fully as great as if the passenger were on the moving train."

Other instructions are criticised, but none of them justify a reversal, although we are in sympathy with the criticism of instruction No. 2, which tells the jury that if they find the evidence for the plaintiff preponderates in her favor, "although but slightly," it is sufficient for the jury to find the issues in her favor. As was said in Yates v. Spooner, 308 Ill. 198, such an instruction is only confusing. Nobody knows what is a "slight preponderance" or a "clear preponderance" of the evidence.

Other points have been made and argued which would too much extend this opinion to comment upon, but none of them is of sufficient importance to require a reversal.

Upon the entire record we find no reasonable ground for setting aside the verdict nor any prejudicial error upon the trial. The judgment is therefore affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

289 - 31109

561 9a

JOHN J. MURPHY,
Appellee,

vs.

WILLIAM E. DEE COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

243 I.A. 614

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks a reversal of the judgment against it for $11,000 entered upon a verdict on the trial wherein plaintiff sought damages for personal injuries.

Plaintiff's declaration proceeded against the William E. Dee Company and Joe Garland as defendants, and in various counts alleged that he was riding as a passenger in a Dodge automobile driven by Garland, and at the same time a motor truck owned by defendant Dee Company was also going in the same direction; and that, while Garland was in the act of passing the Dee Company truck, "the defendants ** negligently and carelessly managed and operated their respective motor vehicles so that the same collided with each other, as a result of which the plaintiff was thrown" and injured. At the close of plaintiff's evidence the court directed the jury to find Garland not guilty, and the trial proceeded against the Dee Company alone.

It is argued that as the declaration charged that plaintiff was injured by the concurrent negligence of both defendants, the verdict of not guilty as to one necessarily exonerated the other defendant, citing St. Louis, Belleville & Suburban Co. v. Hopkins, 100 Ill. App. 567, where the declaration charged that the concurrence of defendants' acts caused plaintiff's injuries. In the present case it is charged that defendants negligently o perated

their respective motor vehicles so that the same collided. The allegations of negligence of Garland could have been omitted and sufficient allegations charging negligence against the Dee Company would have remained. The fact that they were charged jointly with negligence is wholly immaterial, as in an action of tort under a declaration charging two or more defendants with jointly injuring a plaintiff, there may be a verdict and recovery against one only. The rule in this respect is different in actions of tort than in actions on a contract. Linquist v. Hodges, 248 Ill. 491; Pierson v. Lyon & Healy, 243 Ill. 370; Postal Telegraph Cable Co. v. Likes, 225 Ill. 249; Hartray v. A. T. Willett Co., 232 Ill. App. 193.

It is argued strongly that the verdict is contrary to the manifest weight of the evidence. The accident happened in the city of Hammond, on September 29, 1923, on Saturday about noon, on Indianapolis boulevard, which runs in a northerly and southerly direction and in the center of which are two sets of street car tracks. The width of the roadway between the easterly rail and the easterly curb is approximately twenty-one feet. The Dee Company truck was going north running about a foot and a half east of the easterly street car tracks at a speed estimated at not greater than ten or fifteen miles an hour. Garland in his Dodge was also going north in the pathway of traffic east of the path pursued by the Dee Company truck. It was one of a number of other automobiles going in the same direction which, going faster than the truck, passed it. At the place where the accident happened was a telegraph pole which stood about fifteen inches from the easterly curb.

Plaintiff's version of the accident is that he was running about three feet from the easterly curb and had reached a point about even with the front end of the Dee Company truck when the driver of the truck suddenly turned it in an easterly direction

at an angle of about forty-five degrees and then quickly turned westerly at about the same angle, the rear of the truck striking the rear left side of the Dodge car, throwing it against this telegraph pole. The defendant's theory is that the truck continued in a straight line and that the front end of the Dodge first hit the pole, which swung the rear end of the Dodge against the side of the truck. These respective theories were submitted to the jury. Six witnesses and the plaintiff testified, all in substantial accord, supporting plaintiff's version. Opposed to this, defendant produced five witnesses. It is fair to say that plaintiff's witnesses, some of whom were riding on defendant's truck, were definite that the truck first struck the Dodge, knocking it into the post. The defendant's witnesses were somewhat vague and uncertain. Defendant's driver testified to the presence of two bad spots in the pavement about three feet east of the easterly street car rail and about five feet south of the telegraph pole. It is a reasonable inference that he swung to the right for the purpose of avoiding these holes.

The issue was sharply drawn as to whether the Dee Company truck first struck the Dodge car, or the Dodge first struck the telegraph pole, swinging it into defendant's truck. There is nothing physically impossible in either version, although it is strongly argued to the contrary by defendant's counsel. The question was peculiarly for the jury to determine; it had the opportunity to judge of the intelligence and credibility of the witnesses while they were testifying. We would not be justified in holding that its verdict for the plaintiff is so manifestly against the weight of the evidence that it should be set aside.

Complaint is made of counsel for plaintiff for stating to the jury that "the judgment of the court here is that Garland was not" guilty. We see nothing objectionable in this, especially

as counsel also said that "letting Garland out ** does not mean that the Dee Company is guilty, and it is for you to say whether Dee is guilty or not under the evidence." Furthermore, the jury was specifically instructed that the fact that the court had directed a verdict in favor of the defendant Garland was not to be taken as an indication that the court thought that the defendant Dee Company was guilty or that the plaintiff was entitled to a verdict against the Dee Company, and that it was not to be considered as an intimation from the court that the jury should find any particular verdict in the case.

It is said that the amount of the verdict of $11,000 is excessive. Plaintiff was thrown out of the Dodge car. He received a fracture of the fibula and the tibia was broken in five places. The bones were overlapping and an extension apparatus was used in an attempt to secure apposition. He was in the hospital for six weeks and four days with the leg elevated and extended by the use of weights. The cast put on at the hospital remained for about two months. He used crutches until about February of the following year. He testified that at the time of the trial, two years after the injury, the leg would be stiff in the morning and swollen and painful at night. He was required to massage it with hot oil and wear an elastic bandage. The leg was shorter by one and a half inches than the other leg. The calf of the leg was wasted and the leg was scarred and marked. By an X-ray taken just before the trial it was shown that the fractured bones were not in alignment, which was a fixed and permanent condition, and the doctor testified that "repair has proceeded as far as it can or will."

Citation of other verdicts rendered for similar injuries many years ago are hardly applicable to the present economic conditions. As we have said before, we will take

judicial notice of the increased high cost of living. Holcomb v. Magee, 217 Ill. App. 272; Posch v. Chicago Railways Co., 221 Ill. App. 241; Bobieski v. City of Chicago, 230 Ill. App. 659. Under the circumstances we cannot say that our judgment is better than that of the jury as to the amount of compensation.

The record does not warrant finding that the verdict is manifestly against the weight of the evidence or that there was prejudicial error on the trial or that the amount of the verdict is excessive.

The judgment is therefore affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

14} - 30410

5629

JOHN L. HEMINGWAY, Administrator of the Estate of Herbert C.Hemingway, Plaintiff in Error,

vs.

CITY OF CHICAGO, a Municipal Corporation, Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

243 I.A. 614

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by John L. Hemingway, administrator of the estate of Herbert C. Hemingway, deceased, the plaintiff, against the City of Chicago, the defendant, to recover damages for the death of the deceased resulting from injuries received in an accident to an automobile in which the deceased was riding and which was driven by a man named John Axel Westlund. The accident was caused by the automobile running into a dead horse which was lying in the street and which, the plaintiff alleges, was negligently allowed to remain there by the defendant.

The case was tried before the court and a jury. The jury returned a verdict in favor of the defendant, and the court entered judgment on the verdict. From the judgment the plaintiff has prosecuted this appeal.

The principal defense of the defendant is that the accident was due to the negligence of Westlund who, the defendant contends, was drunk and unable to operate the automobile with reasonable care, and whose intoxicated condition was known to Hemingway, the deceased.

At the time of the accident, which occurred about eleven o'clock at night, Westlund, Hemingway, the deceased, and a man named William A. Berg, were in the automobile. Hemingway was sitting on the back seat. The automobile was going west on

Chicago avenue, a thoroughfare of the City of Chicago. The dead horse was between the street car track and the curb on the north side of Chicago avenue near Townsend street which intersects Chicago avenue. The dead horse had been lying in the street since about noon on the day of the accident, and had been seen by a regular police officer of the City of Chicago between twelve and one o'clock of the day of the accident. When the automobile ran into the dead horse, the automobile turned over on its side, fatally injuring Hemingway, who died the next day. There is no direct evidence that Westlund was driving the automobile carelessly or improperly.

On the question whether Westlund was negligent in not seeing the dead horse, the evidence is conflicting. The testimony on behalf of the plaintiff shows that on the part of the street where the horse was lying the street was dark; that the horse was a dark bay, that the pavement was dark, and that it was difficult to see the horse more than a few feet away.

S. T. Beasley, a witness on behalf of the plaintiff, testified that the horse was a dark bay; that there was no light on the horse; that where the horse was lying there would not be much light shining on the horse, only that which was coming out of some store.

Jack Beasley, a witness on behalf of the plaintiff, testified that "that night at the place where the horse lay the light was very poor;" that you could not see the horse at all; that it was a dark bay; that there was no red lantern or any kind of light on the horse or near it.

Will Martin, a witness on behalf of the plaintiff, testified that there was no light or lantern on the horse; that at the time and place it was dark; that if you were looking directly at the horse you could not see it until you were about ten or fifteen feet from it.

James L. Vail, a witness on behalf of the plaintiff, testified that there was no light on the horse; that the horse was a dark bay; that the ground was dark; that you would have to be within 25 or 50 feet of the horse to see it.

Ryga Vail, a witness on behalf of the plaintiff, testified that the horse was between a bay and a dark brown; that the street was "awful dark;" that you would have to be right up on the horse before you could see it, because it looked so much like the street.

F. V. Topping, a witness on behalf of the plaintiff, testified that the light was "very poor" between Townsend street and the first street west; that he went east on Chicago avenue in an automobile and did not see the horse.

John Axel Westlund, the driver of the automobile in question, a witness on behalf of the plaintiff, testified that the street was dark and slippery; that he did not see anything in his way until Berg hollered "look out, is that a horse out there?" that at the same time the automobile struck the feet of the horse; that when he first saw the horse it was about ten feet away; that there was no light on the horse.

William A. Berg, who was in the automobile, testified on behalf of the plaintiff that the light at the place where the horse lay was burning very dimly; that he saw the horse before the automobile ran into it; that he should say that the automobile was then about seven or eight feet from the horse; that when he saw the horse he hollered, "look out," but that it was "too late;" that there was no light where the horse was lying.

On behalf of the defendant Mrs. Carl Pearson testified that there was a light on the corner; that she saw the horse lying there.

Joseph Pecce, a witness for the defendant, testified that the street lights were burning; that there was a light about 30 or 35 feet from the horse.

Charles Tuzzelna, a witness on behalf of the defendant, testified that the horse was right in front of his shop; that he had lights in his shop; that an electric light was burning outside.

Sophia Kozdron, a witness on behalf of the defendant, testified that the street lights were burning.

Edward Spencer, an electric light patrolman for the City of Chicago, testified on behalf of the defendant that three are lights were burning brightly; that there was a light 25 or 30 feet from the horse; that he saw the horse; that the horse could be seen at a distance of 50 or 60 feet in front of the horse.

Harry W. Beauman, an electrical engineer for the City of Chicago, testified that under ordinary conditions the intensity of an arc light on the street would be .177 foot candles, which is about eight times the intensity of the full moon on a clear night without interference of buildings or any of that sort of thing."

On the question whether Westlund and Hemingway, the deceased, were intoxicated, the evidence is conflicting.

On behalf of the plaintiff, Jack Beasley testified that he started to pick Westlund up after the accident; that he, Beasley, was within a foot or six inches of him; that he did not smell any liquor on his breath. In answer to the question, what was his breath like, he answered, "I couldn't smell his breath." He testified further that he pulled Hemingway from underneath the automobile; that his, Beasley's, face was right at Hemingway's. In answer to the question, did you smell his breath, he answered, "I couldn't smell nothing." He testified further that he knew the smell of liquor on a man's breath.

James L. Vail testified on behalf of the plaintiff

that he helped Westlund up; that he did not smell any trace of liquor on the breath of either Westlund or Hemingway.

Syga Vail testified on behalf of the plaintiff that he was "right up to" Hemingway and did not smell any liquor; that he was near Westlund and he did not smell like alcohol at all; that he was near enough to the men to smell liquor if there had been any on their breath.

F. V. Topping testified on behalf of the plaintiff that he had been in the automobile previous to the accident; that while he was with Westlund and Hemingway there was no drinking; that on that evening he did not smell liquor on their breath nor see in the action of either anything that would indicate drink or intoxication.

Robert Topping testified on behalf of the plaintiff that Westlund was at his, Topping's, home the evening of the accident between 10 and 10:45 o'clock; that during that time there was no drinking; that while Westlund was at his, Topping's, home, he, Topping, did not see nor smell anything that would indicate that Westlund was drinking; that when Westlund left he was apparently sober.

William A. Berg testified on behalf of the plaintiff that he was with Westlund and Hemingway practically the whole day; that he did not smell liquor on either of them and did not see either of them drink any liquor.

Mrs. A. Christiansen testified on behalf of the plaintiff that she saw Westlund right away when he got home after the accident; that she washed the blood off of his face; that she was real close to him; that she did not smell any liquor on his breath; that she saw him drinking after she washed his face; that he drank almost half a pint; that he was in great pain.

Westlund testified on behalf of the plaintiff that he had not drunk any liquor at any time during the day or evening before the accident; that Hemingway was with him that evening and that up to the time of the accident Hemingway had not drunk any liquor that he, Westlund, "saw or smelled;" that his, Westlund's, breath did not smell of liquor and neither did Hemingway's as far as he knows; that after the accident when he, Westlund, got home, he was in pain all over; that he then "drank some liquor to kill the pain."

On behalf of the defendant, Wanda Sigler testified that she was employed in a millinery store at 24 West Division street; that she saw Westlund and "somebody else" hanging screen doors in the store on the afternoon of the day of the accident; that she was standing about four or five feet from Westlund, and that she smelled liquor on him.

Ned Berger, a witness on behalf of the defendant, testified that Westlund and "another man" were putting up a screen doorin his store at 24 West Division street on the afternoon of the day that the accident happened; that he smelled Westlund's breath; that Westlund and the other man were "staggering drunk;" that they were interfering with his business.

Dr. Eugene L. Hartigan, a witness for the defendant, testified that he was a police surgeon for the City of Chicago; that a little before midnight on the day of the accident he examined Westlund and that he was drunk.

Esther Ritter, a witness on behalf of the defendant, testified that she was a milliner in the store at 24 West Division street; that on the afternoon of the day of the accident while Westlund was hanging a screen in the store, she noticed that "his breath was very strong of something, whether alcohol or moonshine or whatever it was, it was very strong of something."

Jacob S. Leinenkugel, a witness for the defendant, testified that he was a sergeant of police of the City of Chicago; that on the night of the accident he went to 931 North LaSalle street about 11:25 or 11:30 o'clock, and arrested Westlund; that Westlund was in a very intoxicated condition; that there was blood on the front part of his nose and he was very dirty in the face; that he had his coat and collar and shoes off; that there was a bottle on the sink that contained some moonshine.

John Kaparak, a witness for the defendant, testified that he went to Westlund's flat with Sergeant Leinenkugel on the night of the accident; that he saw liquor there; that it was in a pop bottle; that Westlund was staggering around there and did not have his shoes or coat on.

We shall not discuss the question whether the defendant was negligent or the question whether Westlund and Hemingway, the deceased, were guilty of contributory negligence, as we are of the opinion that the judgment should be reversed because of an erroneous instruction given by the court at the request of the defendant. We have stated the evidence merely to show that it is conflicting on material issues of fact, and that consequently the jury should have been accurately instructed. Dowdey v. Palmer, 287 Ill. 42, 55; Wabash Ry. Co. v. Henks, 91 Ill. 406, 414; Hayes v. Fuller, 9 Ill. App. 528, 530.

The instruction in question is as follows:

"24. The court instructs the jury that if you find from the evidence that at the time of the accident as alleged, the deceased, Herbert C. Hemingway, was riding in the automobile being then driven by Alex Westlund and said Alex Westlund was in an intoxicated condition and said fact was known to said Herbert C. Hemingway, then that fact establishes independent negligence on the part of the said Herbert C. Hemingway and the jury must find the defendant, City of Chicago, not guilty.

"The court further instructs the jury that if you believe from the evidence that the driver of the automobile was in a condition as a result of intoxication which rendered him unable to operate the automobile with proper diligence and skill and this fact was known or was noticeable to the said deceased, the jury must take this fact into consideration, along with the other facts in the case to determine whether the said deceased exercised ordinary care in entering the auto or remaining in it.

"The court further instructs the jury that if you believe from the evidence that the driver of the automobile had been drinking before the accident, it is a question of fact for the jury whether the said deceased was guilty of contributory negligence in remaining in the automobile under such circumstances. (Given.)"

It will be observed that although the instruction was numbered, marked and given as a single instruction, yet the first paragraph is a complete instruction in itself and concludes with a peremptory direction to the jury to find the defendant not guilty. Furthermore, it is obvious that the first paragraph is directly inconsistent with the paragraphs immediately following it.

The first paragraph of the instruction is so manifestly erroneous that comment is hardly necessary. It ignores the question of the degree of Westlund's alleged intoxication, the question of the effect of his alleged intoxication on his ability to drive the automobile carefully, and the question whether his alleged intoxication was the proximate cause of the accident.

Since the first paragraph was in reality a complete instruction, and since the instruction was peremptory, the error in giving it was not cured by the second or third paragraph or by any other instruction in the series of instructions. Cantwell v. Harding, 249 Ill. 354, 358; Cromer v. Borders Coal Co., 246 Ill. 451, 457; Krieger v. The Aurora, Elgin & Chicago, R. R. Co., 242 Ill. 544, 551. Whether the jury followed the peremptory instruction in the first paragraph, or whether they understood that the principles announced in the second and third paragraphs embodied the correct rules of law, we do not know. In view of the fact that the first paragraph was a complete instruction in itself and was in peremptory form, the jury had the right to follow the first paragraph. Wabash Railway Co. v. Henks, supra. (p. 414); Volk v. Hoehn, 70 Ill. 297, 300. The first paragraph reasonably cannot be harmonized with the second and third paragraphs.

Counsel for the defendant contend that the declaration

does not allege that the action was brought within a year after the death of Hemingway; that in the absence of such an allegation the trial court was without jurisdiction to hear the cause and that the Appellate court is without jurisdiction to review the errors assigned by the plaintiff; that the abstract does not show when the action was brought and that this court cannot look to the record to ascertain when it was brought.

The contentions of counsel for the defendant cannot be considered for the reason that the defendant has assigned no cross errors. Forcum v. Brown, 251 Ill. 301, 315; Stowell v. Spencer, 190 Ill. 455, 464. Even though it may be assumed for the sake of argument that the contentions of counsel for the defendant involve a question of jurisdiction, yet they cannot be considered in the absence of an assignment of a cross error by the defendant. Wickett v. Hastings, 209 Ill. App. 305, 306; Sargent v. Handy, 194 Ill. App., 111, 112.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

14½ - 30410

JOHN L. HEMMINGWAY, Administrator of the Estate of Herbert C. Hemmingway, Plaintiff in Error,

vs.

CITY OF CHICAGO, Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

243 I.A. 614

SUPPLEMENTAL OPINION BY MR. JUSTICE JOHNSTON.

In their petition for rehearing counsel for the defendant suggest that we erred in holding that since the defendant filed no cross errors, we could not consider the contention of counsel for the defendant that the declaration failed to state a cause of action, in that the declaration did not affirmatively show that the action was brought within a year after the death of the plaintiff's intestate; that in so holding we misapprehended the point which counsel for the defendant desired to make; that the precise contention of counsel for the defendant was that "the abstract failed to show what was necessary to give this court jurisdiction;" and that "there is no such thing as filing cross errors about what an abstract fails to show."

Counsel for the defendant further state explicitly in their petition for rehearing, "we said that neither in the declaration as abstracted nor in any other part of the record as abstracted does it appear that this suit was brought within a year of death."

In order that there may be no mistake as to what was the contention of counsel for the defendant in their original brief, we shall quote the entire argument of counsel for the defendant on the subject in their original brief, as the argument is not lengthy:

> "It is elementary that in a statutory action the jurisdiction of the court must affirmatively appear. Filing suit within the year after death must appear by allegations of that fact in the declaration. Unless it so appears the court is without

jurisdiction. Hartray v. C. C. Ry. Co., 290 Ill. 85.

"In this case the declaration does not allege the bringing of suit within a year after the death. Under the Hartray case it did not state a cause of action.

"We are aware that several Appellate court decisions hold, in seeking to avoid the effect of the Hartray decision, that if the record shows suit was filed within the year then an allegation to that effect is unnecessary. Whether these appellate decisions be correct or not, they do not help plaintiff in error.

"The abstract does not show when suit was brought; it does not show when the declaration was filed. Even under the appellate decisions suit within a year must affirmatively appear. It does not appear here.

"A reviewing court will not go to the record to help an appellant or plaintiff in error. The party seeking to review must by his abstract show everything necessary to give the reviewing court the right to move in his favor. If he do not do so the judgment sought to be reviewed must be affirmed.

"Here a jurisdictional fact is not shown. This court cannot review the errors assigned."

It will be observed that counsel for the defendant did not state in their argument in their original brief that "neither in the declaration as abstracted nor in any other part of the record as abstracted does it appear that this suit was brought within a year of death." On the contrary it will be noted that in the second paragraph counsel for the defendant explicitly state, without any qualification whatever, that "the declaration does not allege the bringing of suit within a year after the death."

Perhaps on a fair interpretation of the whole argument of counsel for the defendant in their original brief, it may be said that they intended to state that the "declaration as abstracted did not allege that the suit was brought within a year after the death. The fact is, however, that there is no such explicit statement in the argument of counsel.

However, if the contention of counsel should be considered as they state it in their petition for rehearing, that "Neither in the declaration as abstracted" nor in any other part of the record as abstracted does it appear that the suit was brought within a year of death," nevertheless we are still of the

opinion that the contention is without merit. The declaration as abstracted shows the date of the accident and the record shows the date on which the declaration was filed. From those two dates it appears that the declaration was filed within the year after the death of plaintiff's intestate.

Counsel for the defendant maintain, however, that according to the authorities we cannot look to the record to ascertain when the declaration was filed; that everything necessary to give this court jurisdiction must be shown by the abstract, and that the abstract does not show the date on which the declaration was filed.

Rule 18 of the Rules of Practice of this court in regard to abstracts is not an inflexible rule that can never be disregarded. If we are of the opinion that the enforcement of the rule would work an injustice we may disregard the rule. In the case at bar we clearly are of the opinion that the plaintiff was entitled to a new trial, and we think that it would be trifling with justice to deny the new trial on the ground that although the record shows that the declaration was filed within a year after the death of the plaintiff's intestate, we cannot consider that fact because that part of the record has not been abstracted.

The rule is well established that a court is the best interpreter of its own rules, and may disregard them provided that injustice does not thereby result. Mix v. Chandler, 44 Ill. 174, 175; Field v. Chicago, Danville & Vincennes Ry. Co., 68 Ill. 367, 369; Ettinhausen v. Marx, 86 Ill. 475, 476; Hunt v. Prenger, 126 Ill. App. 403, 407.

In the case at bar we think that not only will no injustice result from disregarding the rule, but that injustice would result if the rule was enforced.

It may be added that the petition for rehearing

filed by counsel for the defendant consists almost entirely of argument; and that under rule 25 of this court, which forbids argument in a petition for rehearing, the petition could be stricken from the files. We have, however, disregarded rule 25 and have considered the petition for rehearing just as we disregarded rule 18 and looked to the record to ascertain the date on which the declaration was filed.

45 - 30884

5621

243 I.A. 614

EVA RUBY RAULSTON,
Defendant in Error,

v.

PEARL T. MOTTLEY,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Pearl T. Mottley, the defendant, from a judgment in favor of Eva Ruby Raulston, the plaintiff, in an action on a promissory note.

The case was tried before the court without a jury.

The plaintiff's statement of claim alleges as follows: "that on to-wit the 14th day of December, 1923, one Milton P. Oldham made his promissory note and then and there promised to pay six months after date thereof to himself or his order the sum of Four Hundred and Sixty Dollars ($460) for value received with interest thereon at the rate of seven per cent per annum after maturity together with costs of court and a reasonable sum as attorneys' fees for collection; and thereupon on the day aforesaid in consideration that the plaintiff, at the request of the defendants would accept and receive of the said Milton P. Oldham the said note and pay to him as a loan upon said note Four Hundred and Sixty Dollars the amount of said note the defendants by their endorsement thereon then and there guaranteed the payment of the said sum of money to the said plaintiff herein and promised the plaintiff to pay her the sum according to the tenor and effect of the said note if the said Milton P. Oldham should not so pay the same; that she thereupon confiding in said undertaking of the defendants, then and there accepted and received from the said Milton P. Oldham the note aforesaid; and that

although the date of payment in the said note has elapsed the said Milton P. Oldham did not nor would not on that day or at any other time pay to the plaintiff the amount of the said note or any part thereof but refused so to do whereof the defendants on the last day aforesaid had notice, yet the defendants have not paid to the plaintiff the amount of said note or any part thereof but refuse so to do to the damage of this plaintiff in the sum of ($537.00) Five Hundred and Thirty-seven Dollars therefore she brings this suit."

The defendant filed an affidavit of merits admitting that Oldham executed a promissory note for $460 payable to himself; denying the other allegations in the statement of claim; and alleging that Oldham never endorsed the note.

The note was introduced in evidence and shows that it was never endorsed by Oldham.

In the view that we take of the case the only question to be determined is whether the note was valid without Oldham's endorsement. The Negotiable Instruments Act (Article 1,section 183, chapter 9) provides that "where a note is drawn to the maker's own order, it is not complete until endorsed by him."

In Kayser v. Hall, 85 Ill. 511, it was held that a note payable to the maker has no validity until endorsed and transferred by him.

To the same effect are the following cases: Yost v. Eckart, 209 Ill. App. 30, 34; Noblit v. Sandmeyer, 166 Ill. App. 431, 434; Murphy v. Schoch, 135 Ill. App. 550, 552.

In our opinion since the note was not endorsed by Oldham it was invalid.

For the reasons stated the judgment of the trial court is reversed.

REVERSED.

McSurely, P. J., and Matchett, J., concur.

72 - 30889

5622

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HARRY GILDER,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

243 I.A. 614

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The defendant, Harry Gilder, was indicted for receiving stolen property. The State waived the felony and the case was tried before the court without a jury. The court found the defendant guilty and sentenced him to the House of Correction for six months. From the judgment on the finding the defendant prosecuted this writ of error.

The indictment charged that the property stolen was owned by the Harder Fireproof Storage and Warehouse Company, a corporation.

Several grounds are urged by the defendant for the reversal of the judgment. In the view that we take of the case, however, it will be necessary to consider only the assignment of error that there is no evidence to show that the Harder Fireproof Storage and Warehouse Company was a corporation.

The rule is well settled that when the offense is charged to have been committed against a corporation, the charge is a material one and must be proved. The People v. Struble, 275 Ill. 162, 165. In that case the court said that the rule "is not a technical rule of law but a substantial one and universally so recognized."

In the case at bar there is no evidence of any kind that the Harder Fireproof Storage and Warehouse Company was a corporation.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

94 - 30911

PARK RIDGE STATE BANK, a Corporation,
Appellant,

vs.

AVERILL TILDEN and JOHN FLETCHER,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

243 I.A. 615

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Park Ridge State Bank, the plaintiff, from a judgment in favor of the defendants, Averill Tilden and John Fletcher, in an action by the plaintiff for money had and received by the defendants.

The case was tried before the court without a jury. At the close of the plaintiff's case, on motion made by the defendants, the court found the issues for the defendants.

We are of the opinion that the finding of the court was correct for the reason that the plaintiff failed to prove by a preponderance of the evidence that the defendants received the money. In this view of the case it will be necessary to discuss only the question of the sufficiency of the evidence.

It is the contention of the plaintiff that the defendants, as undisclosed principals, obtained the money in question on a note which they directed to be executed, and which was purchased by the plaintiff.

The defendants maintain that the note purchased by the plaintiff was not an original note, but a renewal note given for an original note of June 3, 1921, which had been purchased by a man named Marcus Jacobowsky; that the renewal note was delivered to Merrill Cox and Company by Florence Houtleff, the secretary of a syndicate known as the Bankers' Syndicate, and that she received no money for the renewal note.

2431.A. 815

The defendants were members of the Bankers' Syndicate, and were two of the trustees of the Syndicate, the trustees being called in the syndicate agreement the "managing committee." Florence Routleff, the secretary of the Syndicate, was also the secretary of the defendant Fletcher, who was the treasurer of the Syndicate. The Syndicate bought and sold stock of the Fort Dearborn National Bank and other banks. All of the members of the managing committee were officers of the Fort Dearborn National Bank. The Syndicate borrowed money on a series of 15 notes from Merrill Cox and Company, dealers in negotiable paper. Fourteen of these notes were for $5000 and one for $2500. All of the notes were discounted by Merrill Cox and Company. The notes were signed by Florence Routleff and were payable toher. When the Bankers' Syndicate was formed, in a conversation with the defendants Florence Routleff was told by the defendants that she was to be secretary of the Syndicate; that one of the defendants would tell her when she was to borrow money, and how she was to make out notes therefor. She was also told by the defendants that she should take the notes and the collateral to Merrill Cox and Company, get the proceeds and deposit the proceeds to the credit of the Bankers' Syndicate. The money which the plaintiff alleges was had and received by the defendants was money obtained by the defendants on a note for $5000 which was one of the series of the 15 notes. The note was signed by Florence Routleff on November 3, 1921, and was payable to her order six months after date. The note was signed by Florence Routleff individually and not as secretary of the Syndicate. The note was secured by collateral consisting of 30 shares of stock of the Fort Dearborn National Bank. The stock was in the name of Florence Routleff individually. The note was delivered to Merrill Cox and Company. The note, together with the collateral, was sold on November 3, 1921, to the plaintiff by Merrill Cox and Company, and the note and collateral were delivered to the Standard Trust and Savings Bank as agent for the plaintiff.

The Standard Trust and Savings Bank gave a check to Merrill Cox and Company for $9691.32. This amount covered the purchase of the note in question for $4836.60 and also another note purchased for the plaintiff by the Standard Trust and Savings Bank for $4844.72. On June 3, 1921, a note for $5000, signed by Florence Routleff on that date and payable November 2, 1921, being one of the series of the 18 notes, was delivered to Merrill Cox and Company. This note was secured by the same collateral as the note of November 3, 1921, which was purchased by the plaintiff. The note of June 3, 1921, was sold by Merrill Cox and Company on June 8, 1921, to Marcus Jacobowsky.

From the evidence that we have stated so far, it appears that Merrill Cox and Company received from the plaintiff, through the Standard Trust and Savings Bank, $4836.60 for the note in controversy.

The remaining question to be determined and the controlling one, is whether there is sufficient evidence to show that this money actually was received by the defendants. In the present state of the evidence, to establish the fact that the defendants received the money, it would be necessary for the plaintiff to prove that Merrill Cox and Company paid the money to Florence Routleff. The only direct evidenceon this question is the testimony of Florence Routleff; and her testimony is indefinite and unsatisfactory. Her recollection of the transaction is not clear. She stated that she had not "thought very much about these matters in the last few years."

On direct examination she testified that she did not know whether the note was a renewal note or not; that she signed the note and took it to Merrill Cox and Company; that she did not remember whether Merrill Cox and Company gave her a check for this particular note. She was asked this question: "Did, or do you say

that you did or you did not receive a check for the proceeds of this note?" To this question she answered "Yes." She was then asked, "What did you do with it after you received it?" She replied, "I deposited the check to the credit of the Bankers' Syndicate." She also testified that the check was payable to her order, and that she deposited it in the Fort Dearborn National Bank; that she did not remember the circumstances surrounding the execution of this particular note; that she did not remember any conversation with the defendants in connection with this particular note; that she did not know whether she received in return for the note a former note, or whether she received cash or a check.

On cross-examination she was examined as follows:

"Q. Do you recall now, have you an independent recollection now, aside from seeing your name on this document, of the time you signed it, do you recall now of signing this document?
A. If I remember the document?
Q. Yes. A. No.
Q. You merely say you signed it because it has got your name? A. Truly.
Q. But you have no distinct recollection of signing plaintiff's exhibit 1? [the note in question.]
A. No sir.
Q. And at this time you have no distinct recollection that at the time you signed it of having taken it to Merrill Cox and Company? A. No sir.
Q. And you don't know whether this note was a note that was signed by you in the nature of a renewal to take up some previous note or not, do you? A. No sir.
Q. As a matter of fact, as you sit there now, you have not any recollection about this particular transaction, have you? A. No sir.
Q. And when you said this morning that you took thirty shares of stock of the Fort Dearborn Bank stock to Merrill, Cox and Company, you just assumed that because it says on the note there? A. That was the usual course of procedure.
Q. And that is what you based your testimony on this morning? A. Yes sir.

Q. And if that note was given as a renewal of a note that Merrill, Cox and Company held, plaintiff's exhibit 1, [the note in question] then you did not take the shares of stock over with this note, did you? A. No sir.
Q. Merrill, Cox and Company already had the stock, didn't they? A. Surely.
Q. And neither did Merrill, Cox and Company give you a check for this note, if it was a renewal of a former note?
A. No sir."

In our opinion the testimony of Florence Routleff, fairly and reasonably construed, does not show that Merrill Cox and Company paid to Florence Routleff the money which they received from the plaintiff for the note; furthermore, we are of the opinion that the testimony of Florence Routleff, when considered in connection with all of the evidence, does not establish by a preponderance of the evidence that the defendants received the money; and since there is no evidence to show that Merrill Cox and Company, in selling the note to the plaintiff, was acting as the agent or broker of either Florence Routleff or the defendants, it follows that the plaintiff has failed to make a prima facie case.

Counsel for the plaintiff argue that the testimony of Florence Routleff, in effect, was that if the note was an original note she got a check for it; that if it was a renewal note she did not get a check for it; that if the note had been a renewal of the note of June 3, 1931, which was sold to Jacobowsky, the renewal note would have been given to Jacobowsky and not to the Standard Trust and Savings Bank, and no money would have passed; that the undisputed facts taken in connection with Florence Routleff's testimony "make the conclusion irresistible that the note in question was an original note, and that Miss Routleff got a check for it from Merrill Cox and Company, as she did in every other case where an original note was executed and delivered." There is some force in the contentions of counsel for the plaintiff, but we do not think that the evidence is sufficiently clear and definite to justify a positive conclusion. In other words, we are of the opinion that the evidence leaves the transaction in doubt. In such a state of the record it cannot be said that the plaintiff has proved its case by a preponderance of the evidence. There is evidence tending to show that the note was a renewal note of an original note held by Jacobowsky, and that Jacobowsky was the

holder of the original note and the collateral securing the note. Whether Merrill Cox and Company paid the money which they received from the plaintiff to Florence Routleff or to Jacobowsky, is not shown by the evidence. On the evidence the question is one only of conjecture.

It is the rule that a reviewing court should not set aside the verdict of a jury merely because there may be a doubt of the correctness of the verdict. Illinois Central R. R. Co. v. Cowles, 32 Ill. 116, 121; DeForrest v. Oder, 42 Ill. 500, 501. The finding of a court is entitled to the same weight and consideration as the verdict of a jury. Fisk v. Hopping, 169 Ill. 105, 108.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

139 - 30958

HELEN DUGDALE,
Appellant,

vs.

WOLFE, STEFFELIN & CO.,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 615

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Helen Dugdale, the plaintiff, against Wolfe, Steffelin & Co., a corporation, the defendant, to recover damages from the defendant as an insurance broker in the sum of $4500, for an alleged breach of contract by the defendant in "carelessly and fraudulently" causing to be issued to the plaintiff on the plaintiff's property in the state of Florida certain fire insurance policies written by insurance companies that were not licensed to do business in the state of Florida or the state of Illinois, and which refused to pay the plaintiff's claim of loss.

The case was tried before the court without a jury. The court found the issues against the plaintiff and entered judgment on the finding. From the judgment the plaintiff has prosecuted this appeal.

The material evidence on behalf of the plaintiff consists of the testimony of the plaintiff alone. She testified that she had had business dealings with the defendant for seven years; that employees of the defendant came to her house and wrote insurance for her; that they sold her some stock in certain fire insurance companies; that the property insured by her was a public garage located at Valparaiso, Florida, and that the business was conducted by her two sons; that in the fall of the year 1922,

Hebert Hall, an employee of the defendant came to see her at her home in the city of Chicago, to sell her some more stock; that she told him that she did not want any more stock; that also she told him that she was going to Florida to get her garage insured; that the agent of an insurance company in Florida had asked her several times to have the garage insured by his company; that Hall asked her why she did not have it insured in his company; that he would let her know "if we can write it;" that some time later in the fall "someone" called her up from the defendant's office and said that "they had written some of the insurance;" that she received nine or ten policies from different companies covering the building and contents of the garage; that on February 10, 1923, she paid the premiums on the policies to the defendant, and that on February 11, 1923, the garage building and its contents were destroyed by a fire which originated in a building next door; that some of the insurance companies paid their insurance but others did not; that prior to receiving any of the policies of insurance she did not know in what companies the insurance was written and that no one advised her in what companies the insurance was written; that prior to the time the insurance was written she had not talked to anyone connected with the defendant except Hall; that J. J. Collins, an employee of the defendant told her after the insurance was written that he had had a hard time to get insurance; that one reason that it was difficult to get insurance was the lack of fire protection in Valparaiso; that she never had any conversation with Hall in regard to the question of fire protection; that she asked for insurance only in reliable companies; that she did not know anything about policies and trusted her agents; that the total amount of the insurance was $12,000 or $12,500; that she had received all the money on the policies except about $6000; that when the policies of insurance were delivered to her nothing was said about the

companies being qualified to do business in the state of Illinois.

Robert Hall, on behalf of the defendant, testified that he was employed by the defendant; that he had known the plaintiff since the year 1917; that he "took care of her insurance matters, including automobile, accident and fire insurance; that the matter of the garage at Valparaiso, Florida, came up in October, 1922; that the plaintiff asked him if he thought it possible to get insurance on a garage she had acquired at Valparaiso; that he told her that he did not know whether it was possible; that he would consult J. J. Collins, the manager, and let her know; that several days later he told the plaintiff that they could possibly get some insurance to cover the garage, that they were negotiating with several companies, but that he did not have anything definite to tell her; that several weeks later he called at her home and told her that most every American company, or every company that they acted as agent for, had rejected the risk, and that they would experience a lot of difficulty in placing the insurance; that he told her that owing to the fact that Valparaiso was not equipped with fire fighting apparatus, the companies did not want to assume liability on any property in the town, but that he had not given up hope of placing the insurance; that he never discussed with the plaintiff what sort of companies the insurance would be written in; that he told her they could probably get the uncovered portion in foreign companies; that she was satisfied with the policies; that he delivered some of the policies around January 1, 1923, and that he told her at that time about the difficulty that they had experienced in getting the policies; he told her that they would be lucky if they succeeded in getting any further "coverage," and that he had given up hope of fully "completing the line;" that he did not know anything about the garage in Valparaiso until he called the plaintiff up in the fall of 1922; that he did not know in what companies the insurance was written and did not inform himself

whether the companies were licensed to do business in the state of Illinois; that Collins told him they were unable to secure any policies from companies which were licensed to do business in Illinois or Florida.

J. J. Collins, the manager of the defendant, testified that the order for the plaintiff's insurance was given to him by Hall; that he submitted the order to various general agents in Chicago [naming the agents]; that he was unable to secure the insurance from any of the agents; that he finally secured some policies from C. H. Begart in Westwood, New Jersey, with whom he had done business before, and whom he had found to be satisfactory; that it took three months to secure all of the insurance; that after he had been trying to get the insurance for at least a couple of months he saw Hall possibly every second or third day; that the first policy was issued on October 9, 1922; that prior to the date on which the plaintiff paid the premiums on the policies, the plaintiff signed in his office the following paper which he had dictated to a stenographer. [The paper is referred to as Defendant's Exhibit I, and is as follows]:

"Wolfe, Steffelin Company,
226 West Adams Street,
Chicago, Ill.

Gentlemen: It is my desire that you use your best efforts to secure for me insurance upon my property as you may be or have been from time to time requested in such companies as may have been or be found available. It being understood that said Wolfe, Steffelin Company are not, have been or shall be in any manner held liable in any amount for the responsibility of such insurance so secured.

Truly yours,
Helen Dugdale."

Collins testified that the Defendant's Exhibit I was signed by the plaintiff at his request after the policies of insurance had been delivered to the plaintiff; that he did not request the plaintiff to sign the Defendant's Exhibit I before he secured the insurance because he made every honest effort to get the insurance in big American companies, and that when he encountered

the difficulties of securing the insurance in those companies he took that precaution; that when the plaintiff signed the Defendant's Exhibit I, the plaintiff did not give him anything of value and he did not give the plaintiff anything of value; that no consideration passed between them.

The testimony of the plaintiff in regard to signing the Defendant's Exhibit I is as follows:

"Q. I will show you, Mrs. Dugdale, a document which is marked for identification defendant's exhibit 1, and ask you if that is your signature on it?
A. My signature, but I don't know whether that was on there.
Q. That is your signature?
A. Yes. But I don't know that that was on there. It might have been written afterwards.
Q. You think that might have been written afterwards? A. Yes.
Q. And do you know where it was written? A. I don't know.
Q. Don't you know anything about it? A. No."

It was stipulated by the parties that none of the insurance companies in question was authorized to do business in the state of Illinois.

It is contended by the plaintiff that the Defendant's Exhibit I cannot be considered as a waiver by the plaintiff which precludes her right of recovery from the defendant, since there was no consideration for the signing of the exhibit; that the plaintiff's right of action arises by reason of the fact that the policies of insurance in question were void under the statutes of Illinois, because the policies were issued by insurance companies that failed to comply with the laws of Illinois; that the defendant was the agent of these companies and having unlawfully acted as agent for legally incompetent and irresponsible principals, the defendant "rendered itself personally liable to the plaintiff."

The defendant maintains that the plaintiff's action is barred by the Defendant's Exhibit I; that furthermore, although the plaintiff's statement of claim alleges that the plaintiff requested the defendant to place the insurance with reliable insurance companies, "licensed to do business in the State of Illinois," yet

the plaintiff has failed to prove that there was such agreement; that the testimony of the plaintiff in that respect was that "there was nothing said about the companies being qualified to do business in the State of Illinois;" that also the plaintiff has not proved that the insurance companies in question were licensed to do business in Florida; that moreover the plaintiff's statement of claim alleges a breach of contract, and does not aver that the insurance policies were void by reason of the failure of the insurance companies to comply with the laws of Illinois.

We are of the opinion that the plaintiff is barred from a recovery from the defendant by reason of having signed the Defendant's Exhibit I. In this view it will not be necessary to consider any of the other questions in the case. We are satisfied from the evidence that when the plaintiff signed the Defendant's Exhibit I it was in the form in which it appears in the record. There is no evidence whatever to support the plaintiff's statement that "it might have been written afterwards."

We think that the Defendant's Exhibit I, whether construed as a waiver or as an estoppel, constitutes an agreement by the plaintiff not to hold the defendant personally liable; and further, we are of the opinion that there was a legal consideration for the agreement. As we interpret the evidence, the preponderance of the evidence clearly shows that when the plaintiff signed the agreement she had not paid the premiums for the insurance, and had full knowledge of the facts that the defendant was having a great deal of difficulty in obtaining the insurance, that the defendant had been unable to secure the insurance from the large American insurance companies, and that a part of the insurance would have to be placed in foreign companies. With this knowledge the plaintiff signed the agreement, paid the premiums for the insurance, and retained all of the policies of insurance. Assuming for the sake of argument that by the terms of the original contract the defendant

was bound to procure the insurance from reliable companies licensed to do business in Illinois and Florida, the plaintiff, by signing the agreement, waived that part of the original contract and entered into a new agreement, the consideration for which was the insurance that she accepted, part of which actually has been paid to her.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

151 - 30970

S. W. IRWIN,
Appellee,

vs.

H. C. WILLIAMSON,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

243 I.A. 615

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by H. C. Williamson, the defendant, from a judgment in favor of S. W. Irwin, the plaintiff, in an action on a contract for the purchase of a Boring Mill by the defendant.

The contract was made between Mary E. Irwin, as executrix of the will of O. C. Irwin, deceased, and the defendant. Mary E. Irwin, as executrix, assigned her interest in the contract to herself individually; and later in her individual capacity assigned her interest in the contract to the plaintiff.

The questions in controversy arise on the amended declaration of the plaintiff and the second amended affidavit of merits of the defendant.

The second amended affidavit of merits was stricken from the files by the court on motion of the plaintiff, on the ground that it did not state a legal defense; and judgment was entered by the court on the court's finding from the plaintiff's affidavit of claim that there was due and owing to the plaintiff the sum of $3500.

The pertinent parts of the amended declaration are as follows:

"That on the 6th day of October, 1920, Mary E. Irwin as executrix of the will of O. C. Irwin, deceased, made and entered into a written contract with the defendant H. C. Williamson, which said contract is in words and figures following, to-wit:

'Berlin, Wisconsin, September 22,1920

'Mary E. Irwin, Executrix of the will of O. C. Irwin, deceased,

Berlin, Wisconsin.

Dear Mrs. Irwin:

I hereby offer to purchase of you for the sum of $3500.00 the Boring Mill lately owned by O. C. Irwin, deceased, and now situated on the premises occupied by him in the City of Berlin, Wisconsin, at any time on or before October 6, 1920. If this offer is accepted within said time by you I agree to pay said sum of $3500.00 as follows:

$500.00 on being notified by you of the acceptance of this offer, and the balance thereof, $3000.00 within sixty days after being notified of such acceptance, provided that if I shall receive the delivery of said Boring Mill from you before the expiration of said period of sixty days, said sum shall be payable at the time of delivery.

Time is of the essence of this offer. Title to said Boring Mill shall remain in the estate of O. C. Irwin, deceased, until paid for by me. Delivery of the Boring Mill to be made where it now is situated and be paid for by you before moved.

H. C. Williamson.'

'Berlin, Wisconsin 10/6/20.

Mr. H. C. Williamson,
321 N. Crawford Ave.,
Chicago, Illinois.

Dear Sir:

Your offer dated September 22, 1920, to purchase the Boring Mill, lately owned by O. C. Irwin, deceased, for the sum of $3500.00 is hereby accepted, pursuant to and as provided in your written offer, dated September 22, 1920.

Kindly send along your check for $500.00 according to your offer. I am now trying to reach you by telephone, so you may be immediately advised of my acceptance of your proposal.

Yours respectfully,

Mary E. Irwin,
Executrix of the will of
O. C. Irwin, deceased.'

* * * * And the plaintiff further avers that the said Mary E. Irwin, individually, and as Executrix of the Estate of O. C. Irwin, deceased, and the plaintiff herein in pursuance of and in accordance with the terms of said contract, and at the place aforesaid have been ready, able and willing at all times since the date of the execution of said contract,

to deliver the said boring mill to the defendant, H. C. Williamson, nevertheless the defendant contrary to his said contract, has refused and declined to receive and accept the said boring mill, and has refused and declined to pay therefor as in said contract mentioned, or any part thereof, either to said Mary E. Irwin, as Executrix of the Estate of D. C. Irwin, deceased, Mary E. Irwin individually or the plaintiff herein, although often requested, and still refuses so to do to the damage of the plaintiff in the sum of Five Thousand ($5,000.00) Dollars."

The second amended affidavit of merits of the defendant is as follows:

"The supposed contract and agreement between defendant and Mary E. Irwin, executrix, was procured by the fraud of plaintiff in representing to defendant that it would be possible to secure permission from the city authorities of the City of Berlin, Wisconsin, to lay a certain side track over and upon a certain public street in the said City of Berlin, Wisconsin, whereby to load the boring mill aforesaid on cars for the transportation thereof, which statement and representation was utterly false and untrue, the fact being that it was not possible to secure such permission and plaintiff when he made said representation well knew that the same was false and made it to defendant intending defendant to believe in and rely thereon and defendant did believe in and rely thereupon to his damage for that without such said permission and the construction of said track it was impracticable to load the said boring mill for shipment to Chicago to which point defendant intended to transport the same as plaintiff then and there well knew.

"2. Plaintiff, in order to induce defendant to agree with said Mary E. Irwin, to purchase the said boring mill, promised, agreed and undertook in consideration that defendant should purchase the same from the said Mary E. Irwin, executrix, that he, the said plaintiff, would procure permission from the authorities of the City of Berlin, Wisconsin, to lay a certain side track over and upon one of the streets of the said city so that defendant might load the said boring mill for transportation by rail but the plaintiff notwithstanding his promise failed, neglected and refused so to secure permission for defendant and to lay down the said side track so that the defendant was unable to load and could not use the said boring mill, because defendant had at said City of Berlin, no use for same, and was buying it for shipment to the City of Chicago, Illinois, for resale, all of which plaintiff then and there well knew.

"3. That the boring mill referred to in the amended declaration of the plaintiff was a ponderous machine weighing approximately one hundred fifty thousand pounds, that it was impracticable to move said machine from its then location, and that delivery thereof could not be made unless and until a spur track was run from the main line of the railroad adjacent thereto up to the machine in question, and that it was necessary that the right of way for the said spur track should be secured over and across a public highway running between the said machine and the said main line of the railroad; that it was orally

understood and agreed between the plaintiff and the defendant that the term of delivery as used in the offer to purchase set forth in the amended declaration meant and should consist in the plaintiff's building at his expense or causing to be built the said spur, and that the plaintiff should secure the right of way for said spur across the said highway, and that the said plaintiff never built or caused to be built the said spur and never secured the said right of way, and never offered delivery of the said machine at any time unto this defendant as it was agreed said delivery should be made.

"4. That the aforesaid machine was at the time of the making of said supposed contract of sale thereof, a used second hand machine, not assembled, but that the lighter parts of said machine were detached from the main machine and located in different places, and that the various parts of the said machine were unknown to the defendant, and that at the time of the making of said alleged contract of sale, and as an inducement to the making of the same, the plaintiff agreed that he would furnish defendant with the list of the parts of said machine so that the defendant might know that the machine was complete when assembled, and that the defendant might have inspection of the said various parts, but that the plaintiff never produced or offered the said list of parts to the defendant and never permitted him an inspection of various parts of said machine, although production of said list of parts and inspection of the said parts were demanded by the defendant.

"5. That, on or about, to-wit: October 11, 1920, the defendant went from Chicago, Illinois, to Berlin, Wisconsin, ready, able and willing to pay, not only the sum of Five Hundred ($500.00) Dollars, which was to have been paid upon the alleged acceptance of the offer set forth in plaintiff's declaration, but also the further sum of Three Thousand ($3,000.00) Dollars, or the entire purchase price of the machine referred to in said declaration, if the said right of way over said highway had been secured, and if said spur from said railroad track had been run up to the said machine so that it could be loaded upon cars, that is to say, if said machine was ready for delivery to defendant as aforesaid. That the defendant on or about said last named date saw the plaintiff in Berlin, Wisconsin, found that the said spur had not been so run as agreed, and demanded of the plaintiff that the said spur and right of way should be obtained as agreed, and that the plaintiff then denied that he had so agreed to secure said right of way and run said spur and refused to deliver as agreed, but said that said machine could not be delivered in any other way and that he would see what could be done about it, and that plaintiff did not then demand the payment of said sum of Five Hundred ($500.00) Dollars or any other sum. Whereupon, the defendant returned to Chicago, Illinois. That thereafter, said plaintiff never did secure said right of way or so run said spur and never did offer to deliver said machine to defendant in manner and form as agreed or at all, and that the plaintiff did on or about said November 11th, 1920, break his said contract and agreement to secure

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said right of way and run said spur and to deliver said machine as agreed, and that plaintiff never has kept his said agreement and never has offered to do so.

"That thereafter, on or about November 17, 1920, plaintiff and the estate of O. C. Irwin, referred to in the declaration herein, caused their attorney to write a letter to the defendant, under date of November 17, 1920, in which said attorney, on behalf of plaintiff and the said estate of O. C. Irwin, said among other things, referring to the alleged contract set forth in the declaration: 'Would it be convenient for you at this time to make payment of Five Hundred ($500.00) Dollars, provided in the agreement relating to the sale of the boring mill. Such action on your part would be very much appreciated.'

"That again, on December 9, 1920, referring to the said alleged contract, the plaintiff himself wrote the defendant a letter in which the following language occurs: 'I shall be glad to learn from you when you expect to complete this deal.'

"That again, on January 1, 1921, the said plaintiff and the said estate of O. C. Irwin, caused their attorney to write the defendant a letter, referring to said alleged contract in which the following language occurs:

"'I am writing to you asattorney of the O. C. Irwin estate to learn if you expect to go through withyour contract for the purchase of the boring mill, and if so, when I can look for a remittance, according to your agreement under this contract.'

"That, by said letters, and by the aforesaid action of the plaintiff, on or about the said 11th day of October, 1920, and by the plaintiff's conduct in relation thereto, the plaintiff did waive and excuse the defendant from the payment of the sum of Five Hundred ($500.00) Dollars, upon defendant being notified of the acceptance of the alleged offer to purchase set forth in the plaintiff's declaration.

"6. That the plaintiff was in all matters, things and representations hereinabove and heretofore mentioned, acting as the agent of Mary E. Irwin, Executrix of the will of O. C. Irwin, deceased.

"7. There is no memorandum in writing as required by the Statute of Frauds of the State of Wisconsin, covering the supposed sale by Mary E. Irwin, Executrix.

"8. That the plaintiff never for himself nor for Mary E. Irwin individually, or as executrix of O. C. Irwin, deceased, complied with the terms and the laws of the State of Wisconsin, relating to contracts of sale, and that the contract alleged in the amended declaration of the plaintiff, was, if it is a contract at all, a Wisconsin contract, and subject in its construction to the laws of that State."

The defendant contends that the written agreement that is alleged in the declaration is incomplete in that the agreement does not provide where the delivery of the Boring Mill was to be made; and that therefore the separate oral agreement that is alleged in the defendant's affidavit of merits in regard to the delivery of the Boring Mill, does not contradict or vary the written agreement, but is "purely explanatory" of the written agreement. The defendant maintains that the provisions in the letter of September 22, 1920, in reference to the delivery of the Boring Mill, relate "to a separate understanding as to delivery", and that "standing by themselves are unintelligible;" that the paragraph in that letter stating: "Delivery of the Boring Mill to be made where it now is situated and to be paid for by you (~~my~~) before moved," refers to "a collateral understanding such as set forth," in the defendant's affidavit of merits. It is evident that the word "you" in the paragraph quoted is used inadvertently for "me". It is further contended by the defendant, that the provision of the letter relative to the payment of the balance of $3000 within 60 days after acceptance is qualified by the following provision: "Provided that if I shall receive the delivery of said Boring Mill from you before the expiration of said period of sixty days, said sum shall be payable at the time of delivery;" that there would have been no "reason for the inclusion of the" qualifying provision "if the circumstances were not as related" in the defendant's affidavit of merits, "to-wit, that the machine was not assembled; that small parts thereof were scattered; that plaintiff would notify defendant when to come and inspect the machine on its final assembly for delivery."

In our opinion the constructions which the defendant places on the provisions of the letter of September 22, 1920, in relation to the delivery of the Boring Mill, are not fair and reasonable constructions. As we view the letter it does not refer to a "collateral agreement" in regard to the delivery of the Boring Mill. We think that the paragraph: "Delivery of the Boring Mill to be made where it now is situated and be paid for by you (sic) before moved" is clear and unambiguous, and does not require any "collateral agreement" to explain its meaning.

Since in our view the contract is complete on its face, under the general rule that in such case parol evidence is inadmissible to vary or contradict the terms of a contract, proof of the oral agreement alleged in the defendant's affidavit of merits in regard to the delivery of the Boring Mill would be inadmissible.

It is further contended by the defendant that the amended declaration is defective in that it does not allege that the plaintiff made a delivery or a tender of delivery of the Boring Mill.

We do not think that the declaration is defective in the respect complained of. By the terms of the contract the defendant agreed to pay $500 on being notified that his offer was accepted. The offer was accepted on October 6, 1920. The declaration alleges that the defendant has refused and declined to receive and accept the Boring Mill; and has refused and "declined to pay therefor as in said contract mentioned or any part thereof." The declaration further alleges that the plaintiff has been "ready, able and willing at all times since the date of the execution of said contract to deliver the said boring mill" to the defendant.

In the case of Scott v. Beach, 172 Ill. 273, quoting with approval from Pomeroy on Contracts, the court said, (p. 278): "An

actual tender by the plaintiff before suit brought is unnecessary, when, from the acts of the defendant or from the situation of the property, it would be wholly nugatory - a mere useless form. If, before or at the time of completion, the defendant has openly and avowedly refused to perform his part, or declared his intention not to perform at all events, then the plaintiff need not make a tender or demand its performance before bringing suit. It is enough that he is ready and willing and offers to perform in his pleading." To the same effect is the case of Osgood v. Skinner, 211 Ill. 229, 234.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

163 - 30982

5626

IONAL FUEL COMPANY,
a corporation,
Appellee,

v.

M. G. FRANKEL,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

243 I.A. 615

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by M. G. Frankel, the defendant, from a judgment in favor of the plaintiff in an action brought by the plaintiff to recover a balance alleged to be due on an account for coal, which the plaintiff sold and delivered to the defendant during a period, beginning November 2, 1920, and ending January 18, 1921.

The case was tried before the court and a jury. At the close of the plaintiff's case, the defendant made a motion that the jury be instructed to find in favor of the defendant. The court overruled the motion, and the defendant stood by the motion and introduced no evidence. The jury returned a verdict in favor of the plaintiff for $920.11.

The principal question to be determined is whether the court committed reversible error in denying the motion of the defendant to instruct the jury peremptorily to return a verdict for the defendant.

According to the well established rule, such an instruction should be given only when there is no evidence which fairly tends to prove the material allegations in the declaration. Libby, McNeill & Libby v. Cook, 222 Ill. 206, 213.

It is also the rule that "the party against whom the motion is directed is entitled to the benefit of all the evidence

in his favor in its most favorable aspects to him, and of all presumptions that may be reasonably drawn from such evidence." Yess v. Yess, 255 Ill. 414, 418.

A motion to direct a verdict is in the nature of a demurrer to the evidence. McCune v. Reynolds, 288 Ill. 188, 190.

Applying the above rules to the evidence in the case at bar, we are of the opinion that the trial court correctly denied the motion of the defendant.

The evidence for the plaintiff shows in substance that the defendant had an account with the plaintiff for the purchase of coal; that at various times the defendant ordered coal and directed the defendant to deliver it to addressees designated by the defendant; that the sales of the coal were charged to the account of the defendant; that the defendant gave the credit department of the plaintiff references as to his financial responsibility; that one bank to which the defendant referred said that the defendant was "all right up to" about $2000, or $3000; that after certain sales of coal, the defendant was asked by a salesman of the plaintiff whether the coal was satisfactory, and that the defendant said that it was; that during the time the sales were being made salesmen of the plaintiff called in person on the defendant many times, and requested payment of the amounts then due to the plaintiff; that the defendant would promise to pay saying that he would pay "next week" or "the first of the month;" that on one occasion the defendant paid a salesman $200 on account; that at one time the defendant called at the office of the plaintiff to ask for an extension of time for payment; that he said he was "going away on a vacation" and that when he came back he would "pay some money;" that at another time a salesman called on the defendant, presented a statement of account to the

defendant, and requested payment; that the defendant sent a check by mail to the plaintiff for $200; that statements of the defendant's account were sent to him twice a month; that he made four payments altogether on his account; that the total amount of sales for coal exclusive of coal delivered at No. 1205 North La Salle street, is $1,784.75; that the total credits exclusive of No. 1305 North La Salle street, are $854.64, and that there is a balance due of $930.11. To prove the account the plaintiff introduced loose leaf ledger sheets containing entries made from delivery books. The entries were made in the usual course of business under the supervision of the bookkeeper by a clerk no longer in the employ of the plaintiff. The bookkeeper testified that he had charge of balancing the account when the entries were made and that he would see that they were correct; that "we" drew off monthly balances and that if there was anything wrong he would consult with the clerk about it; that he, the bookkeeper, checked over all the entries on the ledger sheets and "drawn off statements" and to the best of his knowledge they are true and correct; that he did not know where the clerk is at present. The trial attorney for the plaintiff stated to the court that every effort had been made to find the clerk.

Counsel for the defendant contends that the court erred in admitting in evidence the loose leaf ledger sheets without proper preliminary proof, and in allowing the bookkeeper to read from a statement of the account prepared by him, and referred to as Exhibit 6; further that the loose-leaf ledger sheets do not show the quantities and prices of the coal, and that certain notations on the loose-leaf ledger sheets were not explained. The abstract shows that the court sustained the objection to the admission in evidence of Exhibit 6.

It will not be necessary for us, however, to decide whether the court erred in the respects complained of, as we are of the opinion that the plaintiff has made a prima facie case of an account stated.

We think that it may be presumed reasonably from the evidence that the defendant acknowledged the indebtedness.

In Corpus Juris (Vol. 1, section 276, p. 691) it is said: "Where an account is rendered by one person to another, the retention of the same by the latter beyond a reasonable time without objection is evidence of his assent to the correctness of the account, and, accordingly, is evidence of an account stated. A majority of the cases hold that where the person receiving the account thus retains it beyond a reasonable time without objection, this fact, if unexplained, establishes an assent to the correctness of the account, and a promise to pay the same, and so establishes an account stated."

In the case at bar the defendant did not object to the statements and not only promised to pay the account but actually made payments on the account.

Counsel for the defendant maintains that there is no evidence as to what was shown by the statements that were rendered to the defendant. When we indulge all reasonable presumptions, as we must do on a motion to direct a verdict, we think that it may be presumed reasonably that the statements rendered to the defendant contained items from the entries in the account books of the plaintiff; and that the statements showed that the coal was the same as described in the plaintiff's statement of claim.

Counsel for the defendant further contends that the plaintiff's evidence shows that "the defendant was merely an agent for the owners of the buildings to which the alleged merchandise was delivered."

We think that the plaintiff's evidence shows that the coal was purchased by the defendant on his own behalf and not as agent. The only evidence suggestive of agency is the fact that on one of the statements the word "agent" appeared after the defendant's name; and further that a salesman for the plaintiff testified that the defendant took him over to the home of a man named Hennessey who owned one of the buildings at which the plaintiff had delivered some of the coal on direction of the defendant; and that the salesman knew that the defendant was a renting agent for Hennessey.

In regard to the word "agent" on the statement the bookkeeper on cross examination by the defendant's attorney testified that the bill clerk, the stenographer made up that statement; that it was not made up under his, the bookkeeper's, supervision; and that the word "agent" was not written on any of the ledger sheets. In respect of the salesman's visit to Hennessey, the salesman was examined as follows: "Q. You wanted Mr. Frankel [the defendant] to get some coal business from Mr. Hennessey? A. Or anyone else. Q. And you asked him to do that because you knew he was renting agent for certain buildings? You wanted him to get you coal business? A. No, I didn't ask him for anything other than what he controlled."

We think that the evidence which we have indicated relating to agency, when considered with all of the plaintiff's evidence, does not show that the defendant was not an independent purchaser.

Counsel for the defendant further contends that the court erred in giving certain instructions.

The record does not show at whose request the instructions complained of were given. In fact it does not

appear from the record that the court gave instructions at the request of either party; nor are any of the instructions marked "given" or "refused."

When the record in regard to the instructions is considered in connection with the practice in the Municipal Court relating to the giving of instructions orally, we must presume that the court instructed the jury orally.

The rule of practice in the Municipal Court requires that objections to instructions given orally should be specific. Pecarero v. Malberg, 246 Ill. 95, 97; Northern Coal and Sup. Co. v. Mueller Bros. Fuel Co., 171 Ill. App. 342, 345. In the case at bar the record does not show that the defendant objected either specifically or generally to the oral instructions of the court.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

186 - 31005

THE CHICAGO CONFERENCE ASSOCIATION OF SEVENTH DAY ADVENTISTS, a Corporation, Appellee,

vs.

INDEPENDENT METHODIST CHURCH, a Corporation, PHILIP H. WRIGHT and JOHN ROGERS, Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

243 I.A. 61

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Independent Methodist Church and Philip H. Wright and John Rogers, Trustees, the defendants, from a judgment in an action of forcible detainer brought by the Chicago Conference Association of Seventh Day Adventists, a corporation, the plaintiff.

On May 16, 1926, on motion of the plaintiff we struck the bill of exceptions from the record.

As the questions presented by the assignment of errors relied on by the defendant could be saved for review only by a bill of exceptions, the judgment is affirmed. Mann v. Brown, 263 Ill. 394, 396; Gaynor v. Hibernia Savings Bank, 166 Ill. 577, 579; Lewitz v. McKittrick, 215 Ill. App. 611, 612.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

196 - 31015

R. C. McGILL & CO., for the use of LEWIS-SIMAS-JONES CO., a corporation,

Appellee,

v.

PETER PEERBOLTE,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

243 I.A. 616

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Peter Peerbolte, the defendant, from a judgment in favor of R. C. McGill and Company for the use of Lewis-Simas-Jones Company, the plaintiff, in an action on a contract.

The statement of claim alleges in substance that the defendant had in his possession certain onion sets belonging to R. C. McGill and Company; that R. C. McGill and Company sold part of the onion sets to the firm of Hardin, Hamilton and Lewman, and directed the defendant to ship the onion sets to that firm for the account of and in the name of R. C. McGill and Company; that contrary to instructions the defendant shipped the onion sets to Hardin, Hamilton and Lewman in his own name and collected the sum of $1305; that the defendant refused to pay the money to the plaintiff.

The statement of claim further alleges that R. C. Magill and Company sold and assigned the account to Lewis-Simas-Jones Company for a valuable consideration; that R. C. McGill and Company drew a sight draft against the defendant, assigned the draft and delivered the draft and account to Lewis-Simas-Jones Company and requested the defendant to pay Lewis-Simas-Jones Company on sight the sum of $1305; that the defendant accepted the draft and agreed to pay the amount of the draft

2481.A. 616

to the Lewis-Simas-Jones Company.

The defendant filed an affidavit of merits denying the material allegations of the statement of claim.

The defendant made a motion to strike the statement of claim from the files "upon the ground that neither the same nor the affidavit attached thereto alleges that the plaintiff is the actual bona fide owner of the chose in action therein sued upon and that both failed to show how and when the plaintiff acquired title to the same, if at all."

The motion was denied and a trial was had before the court without a jury. The court found in favor of the plaintiff and entered judgment on the finding.

The defendant moved to exclude the evidence and also moved in arrest of judgment.

The only question in the case is whether the plaintiff was required to allege in the statement of claim that the assignee, the Lewis-Simas-Jones Company was the actual bona fide owner of the chose in action in accordance with section 18 of the Practice Act, chapter 110 of the Code, allowing an "assignee and equitable and bona fide holder of any chose in action" to sue in his own name; and requiring the assignee by his pleading or affidavit to allege that "he is the actual bona fide owner" of the chose in action.

We are of the opinion that the statute does not apply to the present case, as the assignee, the Lewis-Simas-Jones Company, is not suing in its own name. In the case of Burface v. Chicago, Mil. and St. P. Ry. Co., 191 Ill. App., 261, the court said (p. 269): "While section 18 of our Practice Act (J. & A. par. 8555) permits the prosecution by the owner of a non-negotiable chose in action in his own name, we do not understand that he is

precluded from bringing the action in the name of the assignor under the practice established before the enactment of that statute."

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

205 - 31024

FRANK H. KOPP and MAE KOPP,
Appellees,

vs.

GUARDIAN FINANCE CORPORATION,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

243 I.A. 616

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Guardian Finance Corporation, the defendant, from a judgment of $200 in favor of the plaintiffs, Frank H. Kopp and Mae Kopp, in an action for money had and received by the defendant.

The case was tried before the court without a jury. The evidence shows that the plaintiffs paid to the defendant a total of $200 in monthly payments of $25, according to the terms of an alleged contract between the plaintiffs and the defendant.

The alleged contract is in the form of an application made by the plaintiffs to the defendant in respect of the erection of an apartment building and of the purchase of "Gold Bonds secured by Junior Mortgage upon specific real estate in the State of Illinois." The alleged contract is as follows:

"O. K. Henry

Notice: Payments made as provided for herein are not for deposit and cannot be withdrawn. The contract is as herein set up and agents have no authority to alter or amend this application or to bind any of the parties hereto by any statement not made herein.

DUPLICATE APPLICATION

No. B 3090

To the Guardian Finance Corporation,
64 West Randolph Street, Chicago, Illinois.

I hereby make application through you to the Trustees of the Home Builders of America for the erection at my option of a Two Apartment building to cost approximately $12500.00 Dollars ($12500.00), under the benefits and privileges of the plan known as the 'Home Builders Plan,' which provides that after I have complied with all requirements for the purchase of bonds as set forth in the table hereto

attached, the cost of the construction of such building shall be financed and the building erected to my order on the basis of cost plus five per cent (5%).

I hereby make application for the purchase of Twenty-five hundred Dollars ($2500.00) of the par value of bonds belonging to the Trustees of the Home Builders Investment Trust, which said bonds are to be six per cent (6%) Gold Bonds secured by Junior Mortgage upon specific real estate in the State of Illinois. I hereby agree to purchase Twenty-five Dollars ($25.00) of said bonds on the 12th day of each month hereafter and herewith tender you (check, cash) for Twenty-five Dollars ($25.00), it being agreed that from said amount or from my additional payments twenty per cent (20%) of the total amount of bonds so applied for shall be used as security for the punctual performance of all the covenants of this application, and credited to the final purchase of bonds applied for hereunder.

It is agreed that I may use bonds above applied for as part of the purchase price of the property hereinbefore referred to.

It is agreed that all of the conditions and privileges on the reverse side hereof, which are hereby referred to, are made a part of this application and I agree to be bound by all of said conditions and privileges.

Dated at Chicago this 23 day of January, A. D. 1925.

REFERENCES:

Name_____
Address_____
Name_____
Address_____
Accepted by_____

Signature Frank H. Kopp,
Address 2617 Walton St.
Phone No. Mae Kopp (wife)
Occupation of Applicant_____
Salesman Frank O'Neil
This space to be filled in by home office only
Amount received $25.00 Date 1/26/25 By IH Book
No. 21434 L. S. Made_____
Bonds Issued_____
Any Eve 8 P. M. Second Floor
Frank H. Kopp & Mae Kopp
Print applicant's name here.
(On the back of Exhibit A.)

CONDITIONS AND PRIVILEGES.

It is agreed and understood that the payments made herewith are for the purchase of bonds, and not made as a savings deposit, subject to withdrawal, as I understand that the Trustees of the Home Builders of America nor of the Home Builders Investment Trust, nor their agent, The Guardian Finance Corporation, are engaged in a banking or building and loan association business; nor shall this document be construed by the parties hereto or by any court as an investment contract, but as an application for the purchase of bonds and an application to build.

It is further agreed that the purchaser assumes all responsibility for the completion of the purchase of bonds as herein

applied for and agrees, in the event of failure to complete all said purchases, to secure a purchaser, at his own expense, for all bonds applied for herewith or for the balance of the bonds to be purchased.

It is expressly agreed and understood that when I have purchased and paid for the number of bonds herein applied for that I may by application to the Trustees have the right to any of the following options:

1st. To apply said bonds to the purchase of any of the Trust property for sale.

2nd. When said application becomes the lowest number in order of maturity and after all similar prior applications have been satisfied, the Trustees of the Home Builders of America agree to build for resident purposes the total cost of which shall not exceed $12,000.00 for a single dwelling, or $20,000.00 for a two-flat building, or $30,000.00 for a three-flat building, and which shall be in proportion to the amount of said bonds purchased by me according to the requirements of the following table: ***

It is agreed that if I desire to procure the benefit of this option the title of the property to be improved shall be conveyed in fee simple and clear of all encumbrances to the Trustees or order for a consideration to be determined and agreed upon. Such improvement shall be made in accordance with my wishes and desires, subject to the limitations named herein.

I further agree to purchase said property for cash within a period of ten days after same is ready for occupancy on the Trustees special quantity cost plus five per cent (5%) net profit plan; two per cent (2%) of which is due and payable on this date and the balance upon the completion of said building, and I agree to purchase the same from the Trustees on the plan of payments herein set forth. Said costs being defined as the cost of all labor and material entering into or upon said improvement, the land at the agreed price thereof and expenses incidental to the erection of said building, including also the title, guarantee policy, liability, compensation, fire and other insurance, mortgage or brokerage fee, permits, such bonds as may be necessary to execute, the renewals thereof, special legal and technical advice and services, as such Trustees may determine necessary, and to the best interest of all. It being understood that overhead construction charges, including architects and engineers services, estimating, purchasing and checking material and labor, the use of construction machinery and equipment shall not exceed ten per cent (10%) of the total cost of all labor and material entering into the construction of said building.

Or I shall purchase said property on an agreement to purchase at a price to be determined by said quantity cost plus 5% net profit, same to be paid in monthly installments according to the following schedule and subject to the terms of the agreement for a Warranty Deed in use by the Trustees at the time the said contract is entered into:

Table of Monthly Payments Necessary to Mature Each $1000.00 of Purchase Price over Any Designated Period of Years. *** "

The substance of the defense of the defendant is "that said application when received by the defendant was delivered to the trustees of the Home Builders Investment Trust and that all

moneys paid on said purchase of said bonds by the plaintiffs to this defendant have been by the defendant paid to the trustees of the Home Builders Investment Trust upon the purchase of said bonds and that this defendant does not now and never has had in its possession any money belonging to the plaintiffs or any money deposited by the plaintiffs, but that its entire connection therewith, and all moneys received by it from the said plaintiffs has been paid and delivered to the trustees of the Home Builders Investment Trust by virtue of the terms and stipulations of said agreement or original application theretofore referred to and made a part of said affidavit of merits," that "said trustees of the Home Builders of America have at all times and are now ready, willing and able to carry out all the terms and conditions of said agreement or arrangement for the construction of said two-apartment building and that the trustees of the Home Builders Investment Trust are now and have at all times been ready, willing and able to deliver said bonds to the plaintiffs when paid for in accordance with the terms and conditions of said agreement and are ready, willing and able to carry out and perform all terms of said agreement in reference to the construction of said proposed two-apartment building."

The principal error assigned by the defendant for the reversal of the judgment is that the finding of the court is contrary to the law and the evidence.

In our opinion the alleged contract is on its face so indefinite, uncertain and unintelligible that it is incapable of being enforced.

The rule in regard to the definiteness or certainty required in contracts to render them enforcible is stated in Ruling Case Law as follows (Vol. 6, p. 644):

"Notwithstanding the fact that the parties have agreed as to everything with respect to which they intended to agree, the contract may still be expressed in such an indefinite manner that it is incapable of being enforced. It is said to be an elementary rule that in order that a contract may be enforcible the promise or the agreement of the parties to it must be certain and explicit, so that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to. The contract must be certain and unequivocal in its essential terms either within itself or by reference to some other agreement or matter."

For the reasons stated the judgment is affirmed.

AFFIRMED.

McCurely, P. J., and Hatchett, J., concur.

231 - 31050

HABER DIE & STAMPING CO.,
a Corporation,
Appellee,

vs.

E. R. KLEMM,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 616

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by E. R. Klemm, the defendant, from a judgment in the Municipal court of Chicago, on the verdict of a jury in favor of the Haber Die & Stamping Company, the plaintiff, in the sum of $3,277.

The pertinent allegations of the plaintiff's statement of claim are in substance that the defendant gave the plaintiff an order for bolts and nuts; that pursuant to the order the plaintiff made deliveries of the bolts and nuts according to the contract; that the defendant made several payments on account, and that there is due to the plaintiff for bolts and nuts delivered the sum of $1481.15; that further the defendant is indebted to the plaintiff in the sum of $1301.58 for certain nuts of a special size and design specially manufactured for the defendant, but not yet delivered; that further the plaintiff claims that the defendant is indebted to the plaintiff in the sum of $1084.26 for the loss of profits on bolts and nuts, which were manufactured by the plaintiff and offered to the defendant, but which were refused by the defendant; and also for the loss of profits on a quantity of material remaining, which the plaintiff specially ordered for the manufacture of the bolts and nuts which the defendant will not accept even if the material were used in the manufacture of the bolts and nuts; that the plaintiff sold the said material at a loss.

2491A.016

The defendant filed an affidavit of merits in which he admits that the orders for the bolts and nuts were given to the plaintiff, and that a large number of the bolts and nuts were delivered to and accepted by the defendant; but denies that the bolts and nuts were made according to the orders. The defendant also denies all of the other allegations in the plaintiff's statement of claim.

The substance of the evidence is that the bolts and nuts were intended for a company by the name of the V. & S. Bolt Company, of which the defendant was president; that the contract was signed by the defendant individually, as the plaintiff did not wish to extend credit to the V. & S. Bolt Company; that in June, 1922, the defendant gave the plaintiff an order for a quantity of bolts and nuts to be manufactured by the plaintiff specially for the defendant, and for which the defendant agreed to pay the price of $7,178.75; that in July, 1922, the defendant gave an additional order for similar bolts and nuts at a price of $3,443.25; that the plaintiff procured the necessary material and proceeded to manufacture the bolts and nuts; that the plaintiff manufactured and delivered to the defendant $8093.41 worth of the bolts and nuts; that the defendant paid to the plaintiff on account the sum of $6866.71; that thereafter the defendant refused to receive any more of the bolts and nuts.

According to the testimony offered on behalf of the plaintiff, the reason that the defendant gave for refusing to receive any more bolts and nuts was that "they were up against it;" that they had invested several thousand dollars in the proposition, that it was not meeting with success, and that they "did not have the money to put into it at this time;" that "it would be taken care of."

The substance of the testimony on behalf of the defendant in respect of his refusal to receive the bolts and nuts

was that a portion of them were not manufactured according to the contract, in that the nuts were too small, the threads were crooked, and that did not "go on" the bolts.

The evidence further shows that when the defendant refused to receive any more bolts and nuts, the defendant owed the plaintiff $1481.15 for bolts and nuts already delivered; also that the plaintiff had on hand a large quantity of bolts and nuts of unusual sizes and designs, which had been manufactured specially for the defendant and which became valueless because they could not be sold to the trade; further, that the plaintiff had on hand a large quantity of steel and other material of a particular kind which had been purchased specially, and which could not be used in its business and which had to be sold by the plaintiff at about twenty-five per cent of its original cost.

The defendant contends that the verdict of the jury is manifestly against the weight of the evidence. Counsel for the defendant has not stated nor discussed the evidence in his brief. We are of the opinion that the verdict of the jury is not manifestly against the weight of the evidence.

The defendant further contends that the plaintiff's statement of claim is defective in that it alleges inconsistent remedies; that the plaintiff should have been compelled to elect which one of the counts in his statement that he stood upon.

The defendant does not maintain that the statement of claim does not state a cause of action. But even if the statement of claim failed to state a cause of action, the judgment should not be reversed on the present record. The defendant pleaded to the statement of claim and a trial was had on the issues made by the pleadings. In this state of the record we are of the opinion that the defendant's objection to the statement of claim is without merit. Under the rules of pleading in the Municipal court, even

though a statement of claim does not allege a cause of action, and even though a judgment by default rendered on such a statement may be reversed, yet if the defendant files an affidavit of merits and a trial is had, the judgment should not be reversed. Lyon v. Kanter, 288 Ill. 336, 339; J. L. Hudson Advertising Co. v. National Trading Co., 236 Ill. App. 269, 271. Furthermore, we do not think that the statement of claim alleges inconsistent remedies. In our view, the statement of claim merely alleges a breach of contract and sets forth the different elements of damage which result from the breach.

The defendant maintains that the court erred in allowing the trial attorney for the plaintiff to ask leading questions "all through the trial." The only questions specifically pointed out by counsel for the defendant are as follows:

"What would ordinarily have been done with these nuts?
Trial attorney for the defendant: I object.
Trial attorney for the plaintiff: In the regular course of business under these orders?
Trial attorney for the defendant: I object to that.
The court: He may state.
Trial attorney for the defendant: It is not material here what would ordinarily be done.
The witness: We would have manufactured bolts for these nuts.
Trial attorney for the defendant: I move that be stricken out also.
The court: Over-ruled."

In regard to the other questions objected to as leading, counsel for the defendant refer to the abstract pages as follows: "Abs. 18-20, 24-26." The rule is that unless it is shown that leading questions are prejudicial, they will not constitute a ground for reversal. Mayville v. French, 246 Ill. 434, 441; Erie & Pacific Despatch v. Cecil, 112 Ill., 180, 186. In the case at bar we do not think that the defendant was prejudiced by the leading questions which have been specified by counsel for the defendant.

The next objection on behalf of the defendant is that "the court erred in the admission of evidence and his manner in the presence of the jury."

The question of the ruling of the court on the admission of evidence is not argued in the brief of counsel for the defendant. The only argument in regard to the objection relates to remarks of the court in ruling on the evidence objected to. In this respect the court said: "You can object but it won't do you any good." Counsel for the defendant says: "This is prejudicial error and tended to create a feeling against appellant. It was unfair." We think that it is obvious that the remarks of the court would not justify us in reversing the judgment.

It is further objected on behalf of the defendant that the court erred in the giving of the instructions. Certain instructions referred to as Nos. 7, 15, 23 and 24 are discussed by counsel for the defendant, but no argument is made as to the instruction designated as No. 18. None of these instructions is set out in full in the brief of counsel for the defendant, as is required by the rule. General Plasters Supply Co. v. Charles F. L'Hommedieu & Sons Co., 228 Ill. App. 201, 206. The record does not show at whose request any of the instructions were given. The record merely recites that "the court gave the following instructions to the jury." It is evident from the record that the instructions were intended to be considered as having been given orally in accordance with the practice of the Municipal court. At the conclusion of the giving of the instructions an objection was made on behalf of the defendant as follows: "To the giving of instructions numbered 2 3 4 5 6 7 8 15 17 18 19 23 and 24 and each of them the defendant E. R. Klemm, by his attorney, then and there duly objected and excepted." This general objection was not sufficient. Where the practice of oral instructions prevails, an exception to the in-

structions should be specific. In the case of Pecarare v. Malberg, 246 Ill. 95, the court said (pp. 96, 97):

"The court instructed the jury orally and the charge ** is divided into paragraphs and at the conclusion the bill of exceptions states that the defendant, Malberg, excepted to each of the instructions given for the plaintiff. The exception does not preserve any question for review. If each paragraph should be considered as a separate instruction, none of them purport to be given for the plaintiff and the bill of exceptions does not state that an instruction was requested by the plaintiff. It is impossible to determine from their form or contents what instructions are referred to as given for the plaintiff, and two of the paragraphs criticised and discussed in the appellant's brief are apparently intended to call the jury's attention to principles which the defendant would desire impressed upon them. An exception to an oral charge on the whole case should point out specifically the portion of the charge objected to. A general exception to the whole charge is not sufficient. 'This is the general rule in all appellate courts, where the practice of oral charges or instructions prevails, and is necessary to prevent inadvertent errors.'"

We have, however, examined the instructions that were argued by counsel for the defendant, namely, Nos. 7, 15, 23 and 24, and we do not think that there is any substantial error in the instructions.

It is further contended on behalf of the defendant that over the defendant's objection "evidence of a custom was allowed, i. e., that five per cent defective were permitted;" and that "this was error." The evidence objected to is not set out in the brief of counsel for the defendant, nor is any reference made to the page or pages of the abstract on which the evidence may be found. Furthermore, counsel for the defendant has not argued the objection and has not shown in what way the court committed error.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

240 - 31060

562a

THE PITT ENGINEERING CO., a Corporation,
Appellee,
vs.
PETER SOTEROS, H. TELLER ARCHIBALD, et al.,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

243 I.A. 616

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a suit in equity brought by The Pitt Engineering Company, a corporation, the complainant, under Section I of the Act on Liens, chapter 82 of the Illinois Code, to enforce against certain property of which H. Teller Archibald, one of the defendants, was a lessee, a mechanic's lien for the installation of a dumb-waiter elevator for Peter Soteros, another defendant, who was a sub-lessee of Archibald.

The cause was referred to a Master who reported in favor of the complainant and found that there was due to the complainant the sum of $1200 with interest at the rate of 5 per cent from November 2, 1932; and that the complainant was entitled to a mechanic's lien for that amount. On the hearing of the exceptions to the Master's report, the court over-ruled the exceptions and entered a decree in favor of the complainant. From the decree Archibald has prosecuted this appeal.

The evidence shows that the defendant, Archibald, was the lessee of the premises in question under a lease expiring on April 30, 1938; that there was an office building on the premises, which was being improved and altered by the defendant Archibald; that Soteros leased a part of the building from Archibald and was remodelling that part to use for a restaurant; that the same architects, Weller and Rippel, were employed by Archibald and Soteros; that the complainant entered into a written contract with Soteros in which the complainant agreed to furnish, erect

243 I.A. 516

and place in the premises "a direct drive worm gear dumb-waiter elevator with push button control," for which Soteros agreed to pay $2100 on the following terms: 65 per cent upon the delivery of the machine, 15 per cent upon the erection of the guides, 10 per cent on the placing of the machine, and the "balance on the completing or placing in service;" that the installation of the improvement was discussed by Archibald, Soteros and the architect Waller; that Archibald was at the premises during the progress of the work every day in the week from the beginning of the improvement until the last day, and that at those times he discussed the progress of the work with the architect Weller.

The contract between the complainant and Soteros provided in part as follows:

> "Proposal: Building at 30 to 34 West Randolph Street, Chicago, Ills. For Mr. Peter Soteros & Mr. H. Teller Archibald. To Weller & Hippel. *** Capacity, Maximum load of 500 pounds exclusive of the weight of car and cage, and shall travel at a speed of 100 feet per minute with average load of 500 pounds, and a constant pressure of 220 volts direct current. Travel of car from basement to third floor, a distance of approximately 38 feet 10 inches with 4 stops. Car to be controlled by means of push buttons. *** Terminal stops will be located at each terminal of travel. Door locks and door switches will be located at each door opening so arranged that door can not be opened except when car is at the floor and car cannot run when any door is open. Guide rails will consist of steel tee rails tongued and grooved securely anchored to building construction by means of steel brackets. *** The machine will be located over the hatch on short beams and flooring provided by us. You are to provide the necessary supports for these beams and are to enclose the machine room. *** The owner is to prepare the hatchway and arrange the building structure to properly accommodate and house this equipment. He is to do all cutting of walls and floors and to do necessary framing or patching after our work is completed. He is to furnish in place suitable wall or building supports for guides, sheaves and machine and will furnish necessary pit at the bottom of hatch to allow the car to travel to the lower landing."

The undisputed evidence shows that the contract was completed by the complainant with the exception of a switch which was to be placed on the third floor door. According to the testimony of the manager of the complainant, the reason the switch was not placed was because the door was not furnished by the other con-

tractors. The manager further testified that the complainant requested the architects Weller and Hippel to furnish the door; that without the door the switch was dangerous; that to operate the elevator without proper enclosure on the third floor would be dangerous for the reason that any one could stick his head in the shaft, look down to see where the elevator was, and be likely to get his head bumped or cut off; that instead of a closed door there was "a temporary wooden structure that any one could reach their arm through or stick their head through and look over the top of it."

The superintendent of the complainant testified that he refused to install the switch on the top landing for the reason that the elevator came approximately two feet above the top landing; that some one down below might push the button and the car would immediately leave; that on that account he did not feel that it would be a safe proposition.

It is undisputed that the cost and installation of the switch would not have amounted to more than $20 or $25.

The points relied on for the reversal of the judgment, as stated by counsel for the defendant, are as follows:

"1. The dummy elevator was a trade fixture of Peter Soteros, appellant's lessee, easily removable without damage to the building and not lienable.

2. Appellee, without any fault on the part of appellant or Soteros, omitted to install a switch which was a necessary part of the work contracted to be performed. This failure of appellee to complete its contract precludes appellee from seeking to enforce a mechanic's lien.

3. There is a fatal variance between the facts found by the court in its decree and the facts set forth in the verified statement of claim for mechanic's lien which was filed by appellee in the Circuit court."

According to the provisions of Section I of the Act on Liens, any person who shall "furnish or perform labor or services in a building, altering, repairing or ornamenting the same, or furnish material, fixtures, apparatus, machinery, labor or services on the order of the agent, architect, structural engineer

or superintendent having charge of the improvements, building, altering, repairing or ornamenting the same, shall be known under this act as a contractor and shall have a lien on the whole of such lot or tract of land as improved for an amount due him for such material, fixtures, apparatus, machinery, service or labor, and interest from the date of the same is due."

To entitle one to a mechanic's lien under section 1, the fixtures constituting an improvement must be permanent. Fehr Construction Co. v. Postl Health Building System, 288 Ill. 634, 641; Alexander Lumber Co. v. Champaign Baseball Club, 201 Ill. App. 246, 247; McAlear v. New York Life Insurance & Trust Company, 177 Ill. App. 339.

In the case at bar the question whether the dummy elevator was a permanent fixture or a trade fixture is principally one of fact.

There is no dispute between the parties as to what are the general rules of law governing the question. The controversy arises from the difficulty in applying the general rules to the particular facts. Numerous cases have been cited by counsel for the complainant and counsel for the defendant Archibald illustrative of the general rules, but it will not be necessary to consider all of these cases, as each case depends largely on its own facts.

According to the Cyclopaedia of Law and Procedure, (vol. 11, p. 1065) there is no precise definition of the term "trade fixtures." It is generally understood to mean such fixtures as are removable on the ground of public policy and also because from the temporary nature of the tenure, they are not presumed to have been annexed with the intention to make them permanent additions to the realty.

The intention of the parties in regard to the permanent or temporary nature of the fixtures is an important criterion to be considered. Fehr Construction Co. v. The Postl System of Health Building, supra (p. 642.) It was held in the cases of Hewitt v. General Electric Co., 164 Ill. 420, 424, and Sword v. Low, 122 Ill. 487, that the intention with which fixtures are attached will, in some instances, control in determining whether the fixtures should be considered permanent.

In the case of Waverly Park Amusement Co. v. Michigan United Traction Co., 197 Mich. 92, in discussing trade fixtures the court quoted (p. 96) from Bronson on Fixtures as follows:

> "To constitute any chattel that has been attached to the freehold a trade fixture, it is only necessary that it be devoted to what is known in the law of fixtures as a trade purpose. ** The form or size of the annexed chattel is immaterial; large buildings, such as stores, barns and ice houses ** have been held trade fixtures."

The rule as to when fixtures are permanent and not merely trade fixtures, as stated in the case of Fehr Construction Company, v. Postal System, etc., supra, is that where the fixtures are firmly attached to the realty, are adapted to and necessary for the purpose for which the premises are used, and were intended to become a part of the realty, they are permanent fixtures.

In the case of Hacker v. Munroe & Son, 176 Ill. 384, the court held that in determining the question whether boilers and fittings were permanent fixtures, the following tests should be applied (p. 396):

> "First - Whether the boilers and fittings in question were actually annexed to the realty or something appurtenant thereto. Second - Their application to the use or purpose to which that part of the realty, where they were situated, or with which they were connected, was appropriated. Third - The intention of the parties, who placed the said boilers and fittings where they were situated, when taken by the plaintiffs in this suit, as to whether they were to be permanent accessories to the freehold or not."

In the cases of Chapman v. Union Mutual Life Ins. Co.

4 Ill. App. 29, 34, and The Galena Iron Works Co. v. McDonald, 160 Ill. App. 211, 214, the following rule was adopted as the test for determining when chattels become real estate:

> "Chattels become real estate when they are annexed to the freehold under such circumstances that it clearly appears from an inspection of the property itself, taking into consideration the character of the annexation, the nature and adaptation of the articles annexed to the uses and purposes of the freehold at the time the annexation was made, and the relation of the party making it to the freehold in question, that a permanent accession to the freehold was intended to be made by the annexation."

A description of the dummy elevator and its annexation to the buildings is substantially as follows: Steel guides were installed which were in the cement in the basement and fastened at each floor to the building structure with bolts sufficient to carry the capacity, and extended on up to the extreme landing. The machine was supported on the floor above the hatch on eye-beams which were cemented into the brick wall and fastened on the building joists with through bolts. The machine was constructed of cast iron, and also anchored to the beams as well as to the joists. The counterweights or counterbalance, which is part of the equipment, runs in the steel guides, as does the car itself. The door locks, door switches, electric conduit, extended from the machine above to the basement and were fastened to the building structure with pipe straps, forgings and brackets. The junction box or terminals were also fastened to the building structure and wires led from the junction box to the cage. The buttons, call and send buttons, which call the car or send it, were fastened to the frame work around the enclosure. The limit switches, which prevent the car from going too far below or too far above and which cut out automatically, were fastened to the brick wall. The controller, which operated the motor, was bolted through the floor above the hatchway. The cage itself was a structure of sheet metal and angle iron framing, which operated in the steel guides

and ran from the bottom landing to the top, serving the openings. The elevator was a direct drive worm gear elevator or dumb-waiter with electric control, push buttons, automatic control. The capacity was 500 pounds. The speed was 100 feet per minute. The pressure which operated it was under two hundred twenty volts D.C. current. The elevator ran from the basement to the third floor and provided four stops. The car was approximately two feet by three feet.

On behalf of the defendant there is evidence that the dummy elevator could be removed from the building without injuring the building. To remove the elevator it would be necessary to take the housing unit off from its setting at the fourth floor or at the top end of the guides, and then to remove the guides, take out the car and close up the floor. The ceiling of the second floor, which is the third floor, and the ceiling of that floor were all cut so that the housing unit was on the fourth floor. The housing unit rested on three or four I-beams that were set into pockets in the wall on one end and onto the floor at the other end. There was no screw through the beams into the top of these posts. The elevator machinery was on some beams or temporary supports, and it operated the car from there down. The floor that the elevator machine was on was an unused floor. There were four or five other floors and above the third floor they were all vacant. The building was not used above the third floor, and the elevator housing unit was on the fourth floor. The unit itself was just as detachable as is the motor in an automobile. After taking the housing unit off from its setting, it would be necessary only to take out the guides and to patch over the hole in each floor of about three feet square and the elevator would be entirely removed. The building would be put back in its approximate original condition. The effect upon the building from the removal of the elevator would be that

there would be left an opening about three feet square on each floor. There would be no other effect on the building except that there would be small holes in the wall where part of the guide had been anchored to the wall of the building.

In our opinion the dummy elevator was a permanent fixture within the meaning of section I, and was not a trade fixture. The part of the building to which it was annexed was being remodeled for a restaurant and the dummy elevator was a part of the improvement of the building. The elevator was firmly annexed to the building with the knowledge and consent of the defendant Archibald. The elevator was adapted to and necessary for the purpose for which the part of the building in question was leased. And in our opinion, when the elevator was annexed, the intention of Archibald, Soteros and the complainant was not that it might be removed, but that it should be permanent.

Counsel for the defendant Archibald contend that the complainant is not entitled to the lien because the complainant failed to complete the contract. In our view the complainant substantially completed the contract. All that remained to be done was to install the switch, and the reason that the switch was not installed was that it would be dangerous to install it until the door was installed. The complainant was not required to install the door. Furthermore, we are of the opinion that the maxim de minimis non curat lex would be applicable since the cost of the installation of the switch would not exceed $25, and this amount in comparison with the total amount of the cost of the improvement, namely, $2100, would be so insignificant as to be negligible.

It is further contended by counsel for the defendant Archibald that "there is a variance between the facts found by the court in its decree and the facts set forth in the verified claim for lien filed in the Circuit court."

A sufficient answer to this contention is that the defendant Archibald failed to point out the alleged variance either in his objections before the Master, or in his exceptions before the court to the Master's report. Edward Hines Lumber Co. v. Great Lakes Chemical Works, 337 Ill. App. 246, 254.

For the reasons stated the decree of the chancellor is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

5620

250 - 31070

SAM LINZER,
Appellee,

v.

SAMUEL G. GOLDMAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

243 I.A. 617

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Sam Linzer, the plaintiff, against Samuel G. Goldman, the defendant, to recover $300 which the plaintiff paid to the defendant under an alleged contract, which the plaintiff avers the defendant failed to perform.

The plaintiff alleges that the defendant agreed to sell the plaintiff a lot in a subdivision known as Green Bay Road Highlands subdivision, near the town of Lake Bluff, in the State of Illinois, for $1500; that $300 was to be paid in cash and the balance in monthly payments of $15; that upon the payment of the $300 the defendant would execute a contract for the sale of the lot; that the plaintiff paid the $300, but that the defendant refused to execute the contract of sale.

The defendant denies all of these allegations of the plaintiff.

The case was tried before the court without a jury. The court found in favor of the plaintiff and assessed the plaintiff's damages at the sum of $300. Judgment was entered on the finding; and from the judgment the defendant has prosecuted this appeal.

On the material issues the evidence is conflicting.

The plaintiff testified that John B. Allen, a salesmann for the defendant, asked him to buy a lot; that he, the plaintiff, told Allen that he was interested in a lot on the North Shore; that Allen said he had some lots in Lake Bluff; that a couple of days later he and Allen went to Lake Bluff; that Allen had a plat of lots and that he, the plaintiff, picked out a lot, No. 364; that the price was $1500, $300 cash and $15 a month; that Allen told him that on payment of $300 he, the plaintiff, would get a contract on lot 364, that the next day he paid Allen $50; that Allen told him to go down to the defendant's office and pay the balance of $250 and get a contract; that he went to the defendant's office and gave a check for $250 to Henry T. Meyer, an employee of the defendant; that at the time that he made the payment to Meyer he, the plaintiff, demanded a contract; that "they told me they would give me a contract;" that Allen and Meyer told him he would have to wait ten days before they would give him a contract; that he was never given a contract.

John B. Allen, on behalf of the plaintiff, testified that he and the plaintiff went out to Lake Bluff and that he, Allen, showed the plaintiff a plat of the Green Bay subdivision; that he believes that the number of the lot that the plaintiff wanted was 364; that he, Allen, told the plaintiff the price and the terms; that the plaintiff told him to call at his office the next day and he would let him know definitely whether he would purchase the lot or not; that the price of the lot was $1500, twenty per cent down and one per cent per month; that on the payment of the $300 the plaintiff was to get a contract; that the plaintiff paid him $50 as a deposit for earnest money on lot 364; that later the plaintiff called at the office with a check for $250; that Allen does not know to whom the plaintiff gave the check; that the plain-

tiff asked him, Allen, for a contract, but that he did not give it to him; that he told the plaintiff that the subdivision was not open.

Henry F. Meyer on behalf of the plaintiff testified that the plaintiff paid him $250 and said that he was "making a full down payment" and wanted a contract on the lot he bought in Greenbay Highlands; that the plaintiff asked him when he could get a contract; that he, Meyer, asked Goldman and got no definite answer.

On behalf of the defendant, the manager for the defendant, Max Steinberg, testified that he remembered that Allen brought in a receipt for $50; that the receipt stated that it was for a lot up on the North Shore; that "they" showed the plaintiff a contract for a lot in Hinsdale, told him that the subdivision on the North Shore was not opened yet, and that "they" would give him the lot in Hinsdale; that the plaintiff was satisfied and signed the contract; that he, Steinberg, saw the check for $250 which the plaintiff paid; that an employee of the defendant named Heath brought in the check; that the check for $50 came in at the same time that the receipt came in; that Heath told him, Steinberg, that it was a check on a lot in Hinsdale; that the bookkeeper of the defendant named Heath crossed off lot 364 Lake Bluff subdivision, which appeared in one of the receipts given to the plaintiff and in place thereof inserted lot 14 in Block 6 Hinsdale.

The defendant testified that he never told Allen nor anybody that there were any lots for sale in the Lake Bluff subdivision; that that subdivision was not open; that he knew that the plaintiff had paid $300 but that it was for the lot in Hinsdale; that he dictated the contract for the sale of the lot in Hinsdale, and that at the time he dictated it he did not know anything about the plaintiff buying a lot in Lake Bluff; that he,

the defendant, did not know anything about his salesmen's promise to the plaintiff that they would give him a contract, or exchange the contract for the Hinsdale lot in ten days, for the Lake Bluff lot; that he did not tell the plaintiff that he would give him a contract on the lot in Lake Bluff; that he, the defendant, never knew that a lot in Lake Bluff had been sold to the plaintiff; that to his, the defendant's, knowledge the plaintiff did not come to his, the defendant's, office and demand his money back.

Attached to the contract for the Hinsdale lot is the following rider:

> "For the purpose of procuring the vender's signature hereto, the second party expressly represents to the first party and to the Chicago Title and Trust Company, as Trustee as aforesaid, that there has been no agreement made to sell said premises on behalf of purchaser hereunder; that no representations of facts or promises have been made to or relied on by the second party in the purchasing of the aforementioned property, other than those set forth in this contract, and that no other agreement pertaining to said premises has been made with any solicitor, salesman or agent of the vender or S. Q. Goldman & Company, and that the second party has personally examined and compared the lot and block numbers of the real estate herein described and has found same correct, and has personally gone upon said property and examined and knows the location thereof.
>
> "In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written at the city of Chicago, Illinois.
>
> Samuel Q. Goldman (SEAL)
> First party (Vender)
>
> Sam Linnes (SEAL)
> Second party (Purchaser)
>
> WITTNESS J. B. Allen
> Salesman."

The plaintiff was called as a witness by the defendant and testified that he signed the contract and the rider, but that when he signed the rider it was not attached to the contract; that at the time he signed the contract they said that in ten days he would get the contract on the Lake Bluff property; that Meyer said, "the contract is just to bind you that you bought a lot. In ten days we will give you the other contract. It is going to be open in ten days and you get the other contract;" that he, the plaintiff, never went down to the Hinsdale property; that he does not know

where the property is located.

The receipt for the $50 which was paid by the plaintiff as earnest money was introduced in evidence, and shows that the lot was lot 364 in the Green Bay Highlands subdivision. [Referred to in the testimony of the witnesses also as the Lake Bluff subdivision.]

The defendant asks for a reversal of the judgment on three grounds: (1) that "the court, having admitted evidence of part of a conversation offered by plaintiff, erred in refusing to admit and consider evidence offered by defendant of the entire conversation;" (2) "The court erred in restricting the cross-examination of the plaintiff and his witnesses by defendant's counsel;" (3) "The court in finding for the plaintiff, did so contrary to the manifest weight of the evidence."

We do not think that the court erred in denying the defendant's offer to prove what is referred to by the defendant as the entire conversation, part of which had been brought out by the plaintiff. The evidence did not relate to a conversation part of which had been brought out on the direct examination. It was independent evidence constituting the principal defense of the defendant. As stated by the trial attorney for the defendant, the offer was as follows: that "he [Meyer] proposed to Linzer [the plaintiff] that he buy a lot in another subdivision and pay this $300 down on it; and that Linzer said yes; and that there was a contract drawn on another lot in another subdivision in the presence of this man and that this $300 was credited on that other purchase."

This offer was made by the trial attorney for the defendant during his cross-examination of Henry F. Meyer, a witness for the plaintiff. According to the well established practice in Illinois, that was not the time to make the offer. The proper time to offer the evidence would have been when the defendant was putting in his case. Peyton v. Village of Morgan Park, 172 Ill., 102, 106; Anheuser-Busch Brewing Assoc. v. Hutmacher, 127 Ill., 652, 657; Bell v. Pravitt,

62 Ill., 361, 367; McNairy v. Tri-City Ry. Co., 179 Ill. App. 152, 158. Furthermore substantially all of the evidence contained in the offer was admitted by the court when the defendant was introducing his evidence.

The contention of the defendant that the court erred in restricting the cross-examination of the plaintiff and of his witnesses by the defendant's trial attorney, relates to questions of the defendant's trial attorney by which he sought to elicit testimony similar to the evidence contained in the defendant's offer which we have just discussed. The substance of the questions which were asked the plaintiff was whether he was not told that he could not get a contract in the Lake Bluff subdivision, and whether he paid the $300 on a contract for a lot in Hinsdale. The substance of the questions which were asked the plaintiff's witnesses Allen and Meyer was whether it was not a fact that they told the plaintiff that they could not sell him a lot in the Lake Bluff subdivision because that subdivision was not opened, but that they would sell him a lot in the Hinsdale subdivision; and that the plaintiff agreed to buy the lot in Hinsdale and agreed that the $300 should be applied on that lot.

We do not think that the rulings of the court complained of in regard to the cross-examination of the plaintiff and of his witnesses were erroneous. The record shows that the questions were not asked for the purpose of impeaching the witnesses either by other witnesses or by the self-contradiction of the witnesses themselves; but were asked for the purpose of eliciting evidence in support of the defendant's case. In this aspect the objections to the questions were correctly sustained for the reasons which we have previously stated in regard to the defendant's offer of evidence which the court refused.

The contention of the defendant that the finding of

the court is contrary to the manifest weight of the evidence in our opinion is not supported by the evidence.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

271 - 31091

5633a

MORRIS AXELROOD,
Appellee,

vs.

ACORN LAUNDRY COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 617

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Morris Axelrood, the plaintiff, against the Acorn Laundry Company, a corporation, the defendant, to recover the sum of $900 as payment to the plaintiff for services rendered by the plaintiff under an alleged verbal contract with the defendant, in which the plaintiff agreed to furnish the defendant the sum of $6000 to be used in carrying on the defendant's business.

The case was tried before the court and a jury. The jury found in favor of the plaintiff and assessed his damages at $900. The court entered judgment on the finding, and the defendant prosecuted this appeal.

The undisputed evidence shows that the plaintiff was an insurance broker and also that he sometimes procured loans as a broker; that he had friends with money; that the defendant was a corporation conducting a laundry business, and had on two occasions employed the plaintiff as a broker to procure loans for the defendant, for one of which the plaintiff was paid 10 per cent commissions and for the other 12½ per cent commissions; that the defendant desired to obtain another loan; that the defendant was in a desperate financial condition and hardly had any security for the loan; that there were two mortgages on its real estate and two chattel mortgages on its personal property; that checks of the defendant were being returned from the bank marked not sufficient funds; that the defendant owed money for insurance premiums;

that the defendant was in need of money and was about to be "closed up;" that in this situation the stockholders and directors of the defendant asked the plaintiff to procure a loan for the defendant; that Jacob Levine, David Rosenberg, Oscar Rosenberg and Irving Bender, who composed all of the stockholders and directors of the defendant, met at the home of the plaintiff; that two propositions were suggested, one of which was for the plaintiff to procure $10,000, pay off a mortgage of about $4,000, "clear everything and pay off all the current bills;" that the other proposition was that if the $10,000 loan could not be obtained, then the plaintiff was to secure a $5,000 loan; that the plaintiff was unable to negotiate the $10,000 loan; that it was agreed that the $5,000 proposition should be increased to $6,000; that at the request of the plaintiff and with the consent of the defendant the plaintiff's attorney prepared minutes authorizing the president and secretary of the defendant to make the loan; that during the time that the attorney was preparing the minutes, Oscar Rosenberg, David Rosenberg and the plaintiff came to his office three or four times; that "they" brought the corporation records of the defendant to him; that thereafter the plaintiff advanced $1,000 cash to the defendant; that subsequently Max Gold and David Katz were elected directors in place of Jacob Levine and Irving Bender, whose interests they had bought; that the plaintiff tendered the balance of the money to the defendant and requested the defendant to execute its note to him for the $6,000; that the defendant refused.

The principal question of fact in dispute is whether the parties agreed on the amount that was to be paid to the plaintiff for procuring the loan. According to the evidence of the plaintiff and Levine the amount was definitely agreed on, and it was to be 15 per cent of the $6,000, namely $900. The evidence of David Rosenberg and Oscar Rosenberg tends to show that the

amount was not definitely agreed on.

It is contended by the defendant that "the plaintiff failed to show that any contract was ever entered into with the defendant regarding the alleged loan."

We are of the opinion that there is sufficient evidence to sustain the verdict of the jury that a contract was entered into by the parties. One controlling fact, which is undisputed, is that the plaintiff actually advanced $1000 to the defendant on the loan. It is not reasonable to suppose that the plaintiff would have advanced this money unless a contract had been definitely entered into. Furthermore, there is testimony of Levine which would indicate that the defendant refused to carry out the contract because Max Gold and David Katz, who purchased the interests of Levine and Bender, when told of the terms of the loan said that the plaintiff's commission was too much, and that they might be able to raise the money themselves.

The defendant also contends that the statement of claim is defective in that it does not allege the length of time that the loan was to run; and that there is no testimony of this fact.

In answer to this contention it may be stated that both the plaintiff and Levine testified that the length of time of the contract was to be one year.

The defendant further objects that the statement of claim "alleges that from the $6000 loan there was to be deducted only the insurance premiums due from the defendant company, while the entire testimony on this point, including that of the plaintiff, is that the plaintiff demanded that the individual indebtedness of the stockholders, amount to approximately $1,000, should also be deducted from the $6,000 loan to be furnished, and that was one of the main objections of the defendant to the terms of

the plaintiff's proposal.

Assuming for the sake of argument that there is such a variance between the statement of claim and the proof, it is a sufficient answer to the defendant's objection that the variance was not pointed out specifically on the trial, as is required by the rule. Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 549; Carney v. Marquette Coal Mining Co., 260 Ill., 220, 225.

The defendant contends that the loan was an individual loan of the plaintiff, and that as the interest is usurious the plaintiff cannot recover.

In our view of the evidence there is sufficient evidence to justify the jury in finding that the plaintiff was acting as a broker and not as an individual money lender; and the rule is that brokers, negotiating loans of other people's money, may charge the borrowers commissions without thereby making a loan at the full rate of legal interest. Guntzer v. Schmaltz, 206 Ill. 560, 563; Hoyt v. Pawtucket Institution for Savings, 110 Ill. 390, 394. The plaintiff had acted as a broker in negotiating two other loans for the defendant, for one of which he received a commission of 10 per cent and for the other 12½ per cent. It is true that the plaintiff testified that during the negotiations in regard to the loan he said he "might make arrangements with you myself if I can furnish you money, my own money." However, we think that it is a fair inference from the evidence that the plaintiff did not intend to furnish the money himself. The fact is that the $1,000 which he actually advanced on the loan was borrowed by the plaintiff from a friend of his, to whom he gave a commission and agreed to give a chattel mortgage.

The defendant contends that the alleged parol contract is with a corporation, and that no definite agreement was arrived at with the directors acting as a board, or by any one authorized

by the board. In our opinion there is sufficient evidence to justify a finding that the contract was made with the full knowledge and consent of all of the stockholders and directors of the corporation.

The rule is that the stockholders of a corporation can ratify any informal or irregular act which is within the corporate power. 10 Cyclopedia of Law and Procedure, p. 1073; 3 Fletcher on Corporations sec. 1860, pp. 3050, 3051.

It is objected by the defendant that the court incorrectly instructed the jury.

The jury were instructed orally by the court and no specific objection was made by the defendant to the instructions. The question of the correctness of the instructions, therefore, was not saved for review as is required by the rule of practice of the Municipal court directing that objections to instructions given orally should be specific. Pecararo v. Malberg, 246 Ill. 95, 97; Northern Coal and Sup. Co. v. Mueller Bros. Co., 171 Ill. App. 342, 345.

The defendant further contends that the judgment should be reversed because the jury were prejudiced by the following answer of the plaintiff to the question why Bender did not appear as a witness: "Because if he is here to testify to facts there would be a judgment for $900, which he will be liable for to Behme and Gold, the two partners, when they bought him out, they signed for certain liabilities. He would be liable for $450." The court sustained the motion of the defendant to strike out the answer. In this state of the record, we do not think that the judgment should be reversed, as in our opinion the verdict of the jury was not influenced by the answer.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

292 - 31112

AUTHORS PRESS, a Corporation,
Appellee,

vs.

JOHN J. BROWN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 617

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the Authors Press, the plaintiff, against John J. Brown, the defendant, to recover a balance of $174.58, alleged to be due to the plaintiff on a written contract for a set of books entitled the Authors Digest.

The case was tried before the court and a jury. At the close of all of the evidence the court peremptorily instructed the jury to return a verdict in favor of the plaintiff. From the judgment on the verdict the defendant has prosecuted this appeal.

The contract was signed by the defendant after an agent of the plaintiff had shown him samples of the material, the paper and the binding of the books. The books were delivered to the defendant on October 14, 1924, and were in the possession of the defendant at the time of the trial.

It is the contention of the defendant that the books did not accord with the sample. The manager for the plaintiff testified that he superintended the filling of the order and that the books were the same as the sample; that he knows that they were the same because "we had that kind of books and no other in stock." Letters from the plaintiff to the defendant requesting payment of the bill were introduced by the plaintiff over the objection of the defendant.

At the close of the plaintiff's case the defendant made a motion "to take the case from the jury on the ground that plaintiff had not made out a proper case, had not sufficiently shown that the books delivered were like the sample."

The court denied the motion.

The defendant then testified on his own behalf that he did not see the books when they were delivered; that he suggested a correction in the certificate but that he had not examined the books as to their appearance and quality when he suggested the correction; that he would have paid for the books if they had been like the sample in material and appearance; that when he was asked to pay for the books he told the plaintiff that when they delivered the books he ordered he would pay for them; that he received letters from the plaintiff in regard to the matter and that he telephoned the plaintiff that he would pay when he received the books he ordered. The defendant was asked this question: "Now, Mr. Brown, were these books like the sample shown you by the salesman as to paper, material and binding?" The defendant answered "No." After the answer was made the trial attorney for the plaintiff objected "on the ground that there is no sample in evidence nor any of the books; they would be the best evidence." The court sustained the objection. Similar questions calling for conclusions were asked the defendant, and objections to the questions were sustained.

We are of the opinion that the court should have granted the motion made by the defendant at the close of the plaintiff's case to take the case from the jury. The plaintiff did not prove by competent evidence that the books that were delivered to the defendant conformed to the sample. The only evidence of the plaintiff in this regard was the testimony of the manager of the plaintiff, and his testimony consisted merely of the conclusion that the books were the same "as called for by the order." This testimony of the manager was similar in character to the testimony of the defendant in regard to whether the books were like the sample. Both witnesses testified to conclusions. In over-ruling the motion of the defendant and in sustaining the objection of the

plaintiff, the court ruled inconsistently.

The defendant, however, is not in a position to complain of the ruling of the court in denying his motion, as the defendant waived that right by introducing evidence on his own behalf, and not renewing the motion at the close of all of the evidence. Ferrero v. Knights of Security, 309 Ill. 476, 478, 479; Harris v. Shebek, 151 Ill. 287, 293.

Independently of this question, however, we are of the opinion that the court committed reversible error in peremptorily instructing the jury at the close of all of the evidence to find in favor of the plaintiff. We think that there was evidence on behalf of the defendant unobjected to, which was sufficient to have justified the court in submitting the case to the jury. The defendant testified that he examined the books to ascertain their condition and quality in comparison with the sample; that he would have accepted and paid for the books if they had been like the sample in material and appearance; that when the plaintiff asked him to pay for the books he told the plaintiff that when they delivered the books he ordered he would pay for them.

The reasonable presumption from this testimony is that the books did not accord with the sample.

The rule is well established in regard to directed verdicts, "that the party against whom the motion is directed is entitled to the benefit of all the evidence in his favor in its most favorable aspects as to him and of all presumptions that may be reasonably drawn from such evidence." Yeas v. Yeas, 255 Ill. 414, 418. To the same effect is the case of Walldren Express Co. v. Krug, 291 Ill. 472, 475. All contradictory evidence or explanatory circumstances must be rejected. Yeas v. Yeas, supra (p.418); Easton Farmers Grain Co. v. Fernandes Grain Co., 229 Ill. App. 102, 107. If there is any evidence fairly tending to support the defendant's plea, the defendant is entitled to the benefit of

the evidence, and to have it considered by the jury. Anderson v. Williams, 262 Ill. 308. A motion to direct a verdict is in the nature of a demurrer to the evidence.

Counsel for the plaintiff contends that "even if the books delivered were not according to the contract, they were accepted by defendant by his failure to return or offer to return them, and by having the name changed." These questions are questions of fact on which there is a dispute when the evidence of the defendant is given the most favorable construction of which it is susceptible, as must be done on a motion to direct a verdict.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

87 - 30904

5635

L. A. SHERWIN,
Appellant,

vs.

MILTON V. BARANCIK,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 617

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is from an order denying the motion of defendant Sherwin to set aside a judgment entered by confession.

The rule to be applied in such cases has been often stated and it is unnecessary to cite authorities. If upon the record it appears that a defendant has a meritorious defense, it is an abuse of discretion to deny his motion to set aside and counter-affidavits in plaintiff's behalf are not received.

In this case the confession was made by virtue of an alleged power of attorney attached to a writing which plaintiff designates as "a certain promissory note." It is attached to the statement of claim and made a part of it. Defendant strenuously contends that it is not a negotiable instrument within the meaning of the law. That point, however, it will not be necessary for us to decide.

The instrument is signed by William R. Weitz, Lawrence Klein and defendant Sherwin. The judgment was confessed against Sherwin alone, and the petition of Sherwin states that plaintiff is the brother-in-law of Klein, one of the co-makers, and that he, Sherwin, signed the note as an accommodation endorser for Weitz and Klein; that the instrument was to be used at the Morris Plan Bank and that he, Sherwin, was promised that the note would not be negotiated until security was deposited with him, which was never done.

Defendant Sherwin says that the note was fraudulently negotiated by Klein to the Morris Plan Bank, and that it was subsequently paid by Klein in full to the bank and returned to Klein.

who gave the note to his brother-in-law, who confessed judgment upon it, knowing that it had been paid.

Sherwin says that plaintiff is not a bona fide holder for value; that he paid no money for the note, and that the same had been paid in full by Klein before plaintiff got it, and that fact was well known not only to plaintiff but also to his attorney.

Plaintiff here urges that the petition of Sherwin to re-open the case is unartfully drawn, and this may be conceded, although it is probably not more so than the statement of claim, which fails to allege that the supposed note was either made or delivered for any valuable consideration to the original payee, or that the plaintiff gave any consideration for it.

The affidavit of Sherwin is supported by an affidavit from Weitz, who says that Sherwin received no consideration for signing the note; that he and Klein borrowed money from the Morris Plan Bank on the note, and that Klein paid the note in full to the bank. He also says that the plaintiff, Barancik, is not the lawful or rightful owner of the note, but has falsely and fraudulently confessed judgment on a note not his property, which was paid in full by Klein.

Construing the statement of claim and these affidavits together, it therefore appears that the plaintiff holds a note for which he gave no consideration and which the affidavits of two of the signers of the note positively aver has been paid in full, while one of these affidavits denies that plaintiff is the owner of the note at all.

Plaintiff cites cases to the effect that it is no defense as against a holder for value in due course that defendant signed a note as an accommodation maker or that, as against such holder, the note was paid in full to the original payee before maturity, all of which may be conceded. The record before us, however, fails to show that the plaintiff is a holder for value in

due course. He does not aver in his pleading that he ever gave anything of value for the note. On the other hand, the affidavits submitted aver that plaintiff entered into a conspiracy with a co-maker to defraud the defendant by confessing judgment on a note which had been in fact paid and of which note, one of the affidavits submitted avers, the plaintiff is not the owner. Such judgment in good conscience ought not to stand, and the order denying the motion to set aside the same will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

100 - 30927

5631a

FLORENCE E. SANDERS, Administratrix of the Estate of Robert S. Sanders, Deceased,

Appellant,

vs.

CHICAGO & EASTERN ILLINOIS RAILWAY CO., a Corporation,

Appellee.

243 I.A. 617

APPEAL FROM CITY COURT OF CHICAGO HEIGHTS.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On July 3, 1924, plaintiff's intestate, while driving an automobile across defendant's railroad at the intersection of South Ashland avenue and 136th street, was struck by a train of defendant's cars, receiving injuries from which he died. Plaintiff brought suit under the statute, alleging general negligence in the control and management of the train, also negligence in failing to keep a lookout and in not ringing the bell or blowing the whistle, as required by statute; also in failing to have a member of the train crew stationed upon the foremost car of the train.

By the fourth and fifth additional counts plaintiff sought to charge the injury inflicted was wanton and wilful. These additional counts, Nos. 4 and 5, were presented and leave to file the same requested after the conclusion of all the evidence. The request was denied by the court. The plaintiff having rested her case, defendant moved for an instruction to find defendant not guilty, which motion was granted, and a verdict of not guilty returned by the jury, whereupon, over-ruling motions for a new trial and in arrest of judgment, the court entered judgment on the verdict.

The controlling question in the case is whether the

court erred in directing a verdict, and the rule to be applied in such a case is well settled in this state. If there is any evidence from which a jury can reasonably find that the material allegations of plaintiff's declaration have been proved, it is error to direct a verdict. The rule was laid down in Libby, McNeill & Libby v. Cook, 222 Ill. 206, and has been followed in many subsequent cases.

The parties strenuously argue the question of whether there was any evidence from which the jury would be justified in finding that the defendant was negligent, as alleged, but in the view we have taken of the case it will be unnecessary to discuss that point further than to say that the court is of the opinion that evidence was given for the plaintiff which would require the submission of that question to the jury.

A closer question, however, and one of equal importance, is raised by the contention of the defendant that there is no evidence in the record from which the jury could find that at and prior to the time of the happening of the accident plaintiff's intestate was in the exercise of due care for his own safety, but that on the contrary the evidence conclusively shows, as a matter of law, that plaintiff's intestate was guilty of contributory negligence which will bar a recovery. The law of this state requires such proof by a plaintiff in this class of cases. As was said in Illinois Central R. R. Co. v. Siler, 229 Ill. 390: "Proof by the plaintiff that he was in the exercise of ordinary care for his own safety is essential to his recovery." This rule has also been announced by courts of review of this state in many subsequent cases.

It therefore becomes necessary to examine the evidence in order to determine whether the jury could reasonably find that such proof of care of the plaintiff's intestate was made.

There was evidence tending to show the following facts: The accident in question occurred July 3, 1924, at about 1:10 p. m. standard time, at the crossing of the intersection of South Ashland avenue, a public street running north and south, with West 136th street, a public street running east and west. This point was outside of the city of Chicago, and at that point Ashland avenue crosses at grade several railroad tracks that run east and west. East of Ashland avenue there were a large number of tracks constituting a switching yard, and some of the switches used in operating trains and cars in this yard are very close to the east edge of Ashland avenue, while some of the switches that connect certain of the main tracks by means of cross-over tracks are west of Ashland avenue. At this point several trains pass over Ashland avenue on regular runs, but there was also some switching and shunting of cars back and forth over these different tracks and across the public highway.

From 300 to 400 feet south of the crossing and just east of Ashland avenue was located the plant of the Illinois Brick Company, at which plant plaintiff's intestate, Sanders, who was an electrician, worked, as did his companion, a man named Walters, who was with Sanders on this day and who at the same time received injuries from which he also died. A picture in evidence shows a roadway from the yards of the Illinois Brick Company to Ashland avenue. The deceased had worked for the Brick company for some time and was thoroughly familiar with the situation at the point where the accident occurred. This crossing was about half a mile from the city limits of Blue Island; it was a country crossing. West of Ashland avenue on either side of the crossing was an open farm country. A person coming out from the plant of the Illinois Brick Company and turning to go north, as Sanders did, along Ashland avenue over the tracks, at all times had a clear and unobstructed view of the

tracks to the west for the distance of a mile or two.

Ashland avenue was at this time a much traveled highway. There was no watchman or flagman at the crossing; there were no gates and no automatic bell to warn the travelers of the movement of the cars on the tracks, nor with this particular train of cars was there any man riding on the forward end of the most easterly car as it was backed from west to east to cross the highway.

Plaintiff's intestate had been working for the Brick company about four or five years and was therefore thoroughly familiar with the crossing. In the course of his employment he went to the plant of the Brick company once a week and sometimes every day, and in so going used this crossing. There was no ordinance or statute requiring that a flagman be kept there, or that gates or bells should be maintained, nor any order of the Illinois Commerce Commission to that effect.

Ashland avenue at this point is sixty feet wide; that part of the street which had been improved was about thirty feet wide. It was not paved but was an ordinary dirt or gravel roadway, muddy in wet weather and dusty in dry weather. Western avenue, which is an improved concrete road leading to Chicago, is one mile west of Ashland avenue and runs north and south, while Halsted street, another concrete road which leads to Chicago, runs north and south and is one mile east.

The traffic on Ashland avenue was heavier in the morning and in the evening than at the middle of the day. At the time of the accident there were no other engines or cars moving near the crossing and practically no traffic moving along Ashland avenue.

Sanders and Walters left the plant of the Brick company in an automobile, and the only other vehicle in this vicinity

at this time was an ice cream wagon which had crossed the crossing a short time before.

The train in question consisted of twenty-five loaded and two empty cars with the engine and tender. It had shortly before been switched west across Ashland avenue, and at the time of the accident was being backed along the south or lead track from the west toward the crossing on Ashland avenue at a speed of four or five miles an hour. The defendant contends that the movement of the train before it reached the crossing had been continuous for a distance of at least 150 feet, but the plaintiff contends (and there is evidence from which we will assume that the jury would have been justified in so finding) that it was at one time moving so slowly as to appear to witnesses who saw it to be standing. As it approached the crossing one of the members of the crew in charge of the train was in the act of climbing up on the side either at the rear of the first car or the front of the second one. There was evidence tending to show that another member of the crew was sitting near the crossing with his back to the crossing sign and looking north, but he did not attempt to flag the crossing.

Plaintiff's intestate, with Walters, and another fellow employee named Wiehofen, having finished their work at the Brick company plant, started back in the direction of the crossing. Wiehofen, who had his own car, left first and drove out of the yard of the plant into Ashland avenue and then north along Ashland avenue and over the crossing, traveling at a speed of twelve miles an hour. Seeing that the train was moving, he stepped on the gas and hurried across. Sanders and Walters followed in their car and were struck by the train at the middle of the crossing.

The only eye-witness of the accident, who was at this

time sitting by the switchman's shanty about thirty feet south of the tracks and eating his lunch, says that he did not see the automobile in which Sanders and Walters were riding until just as the collision occurred; that his attention was first attracted by the conductor, who called his attention to the crossing of Wiehofen's automobile which he says was making an awful noise and appeared to get across with about ten feet to spare and was about fifty feet north at the time the automobile driven by Sanders was struck. He says that it looked like the automobile was hanging on the bumper of the car. At about this time a member of the defendant's crew had been getting up a ladder at the side of the car and got up on top of it and gave signals to stop. The train went about 120 feet before it stopped. When it did so, the automobile was partially under the foremost part of the car and overturned on one side.

Wiehofen testifies that as he approached the tracks the train of cars to the west of him appeared to be standing still, perhaps 20 feet from Ashland avenue; that he kept on going, and as he got on the tracks he glanced to the west again and then for the first time saw that the cars were in motion at about five miles an hour; that he thereupon stepped on the gas and got across; that as he was about over the tracks he heard a noise as though a train might have hit something, slowed up and looked back, and that he saw that the second car from the head end of the backing train was then on the crossing, still moving, and that it did not come to a stop while he was there.

The evidence tended to show that after striking the train pushed the automobile in front of it, and one of the men in the automobile as it was carried along appeared to one of the witnesses to be striking out in the air with his hand. The automobile at and prior to the time it was struck was being driven by plaintiff's

intestate, Sanders.

The foregoing are, we believe, all the material facts bearing upon the question of the care exercised by plaintiff's intestate for his own safety. It is undoubtedly true, as the plaintiff points out, that it is ordinarily and usually a question for the jury to determine, in view of the entire situation, as shown by the evidence, whether an injured person was or was not in the exercise of due care at the time of receiving the injury; but this rule, as well as that which controls in determining the question of alleged negligence of a defendant (which also is a question for the jury) is subject to the modification that there must be some evidence from which the jury can reasonably make the finding upon which the verdict is based.

In view of the condition of the traffic, the situation as to the condition of the roadway, the open and plain view for miles that the deceased must have had of this railway train, this would seem to be a case where it is apparent that either he did not look, or, if looking, must have seen and failed to regard the most obvious things necessary for his own safety and protection. It is undoubtedly true, as plaintiff contends, that the failure to look and listen is not negligence per se, but that an injured person may by many circumstances be excused from the performance of that usual duty. Chicago & Eastern Illinois R. R. Co. v. Schmitz, 211 Ill. 446; Chicago & Alton R. R. Co. v. Pearson, 184 Ill. 386; Pittsburgh, Cin., Chicago & St. L. Ry. Co. v. Banfill, 206 Ill. 553; Pocheo v. Illinois Terminal R. R. Co., 210 Ill. App. 598; Watts v. Wabash Ry. Co., 219 Ill. App. 549, are a few of the numerous cases cited by plaintiff in which that rule has been applied by the courts of review of this state.

A careful reading of these cases, as well as many cited by the defendant, establishes the rule which we think must be here

[illegible]

The foregoing are, we believe, all the material facts bearing upon the question of the care exercised by plaintiff's intestate for his own safety. It is undoubtedly true, as the plaintiff points out, that it is ordinarily and usually a question for the jury to determine, in view of the entire situation, as shown by the evidence, whether an injured person was or was not in the exercise of due care at the time of receiving the injury; but this rule, as well as that which controls in determining the question of alleged negligence of a defendant (which also is a question for the jury) is subject to the modification that there must be some evidence from which the jury can reasonably make the finding upon which the verdict is based.

In view of the condition of the traffic, the situation as to the condition of the roadway, [illegible] duties that the deceased must have had of this railway train, this would seem to be a case where it is apparent that either he did not look, or, if looking, must have seen and failed to regard the most obvious things necessary for his own safety and protection. It is [illegible] time, as plaintiff contends, that the failure to look [illegible] negligence [illegible], [illegible] injured person may [illegible] many circumstances be excused from the performance of that usual [illegible]. [illegible] 446; [illegible] 188 Ill. 386; [illegible], Gin., [illegible] 208 Ill. 889; [illegible] 189 Ill. 449; [illegible] Ill. App. 389; [illegible] 189 Ill. 449; [illegible] 189 Ill. App. 389, [illegible] that rule has been applied by the courts of twelve of the states.

A careful reading of these cases, as well as many other

applied, namely, that if, when all the evidence submitted has been considered, it appears that there is no evidence from which a jury can reasonably infer due care on the part of the person injured, then an instruction for the defendant should be given. T., St. L. & W. R. R. Co. v. Gallagher, 109 Ill. App. 67; Stein v. C. & E.I. Ry. Co., 199 Ill. App. 45; Smecht v. Chicago City Ry. Co., 233 Ill. App. 384; Kohlsaat v. Chicago & Southern Traction Co., 263 Ill. 154, are only a few of the cases which might be cited to this point. Indeed, each case must be controlled by the particular facts which appear in evidence.

It is true, as the plaintiff points out, that in considering all the evidence the instinct of self-preservation which ordinarily tends to the exercise of due care should be weighed and considered; but as was said in Newell v. C. S. C. & St. L. Ry. Co., 261 Ill. 505:

> "To establish and apply a general presumption in favor of care would obviate the necessity of making proof of the fact, which this court has uniformly held must be made."

Neither in plaintiff's brief nor upon oral argument when requested has plaintiff pointed out a fact or a circumstance from which the jury could reasonably infer that the deceased at and just prior to receiving his injury was in the exercise of due care. It is suggested that the train of cars may have appeared to the deceased, as it did to others, to be standing still and that he therefore was justified in attempting to make the crossing. The plaintiff makes much of this suggestion which, we are inclined to think, is quite immaterial in view of the undisputed facts. Whether the train was standing or moving, it was in plain view of the intestate, where, with the exercise of the least bit of care, he could have avoided all danger. He was familiar with the crossing; he was driving a machine which, it is fair to presume, could have been easily controlled. The narrow escape of Wiehofen who

preceded him must have acted as a warning if he had been giving the slightest attention, or if he had been willing to take a warning. Moreover, there is no testimony in the record from which it can be inferred that the train was standing, or appeared to him to be standing, at the precise time he decided to take the risk of attempting to cross. It was for the plaintiff to show, if not by direct evidence at least by some fact or circumstance, that her intestate used some degree of care; but there is not a scintilla of evidence tending to show that he did so.

Moreover, if there was any doubt on this point, the fact that the evidence fails to show that the deceased complied with the statutory duty imposed upon him by virtue of section 161 of chapter 121 of the Revised Statutes, would remove that doubt. See Cahill's Rev. Stat. of Illinois, 1925. That statute provides in substance that a person controlling the movement of any self-propelled vehicle, shall, upon approaching any highway crossing railroad tracks at grade, reduce the speed of such vehicle to a rate of not to exceed ten miles an hour, and at grade crossings at which stop signs are placed such person shall bring the vehicle to a full stop before proceeding over the railroad tracks.

The uncontradicted evidence of Wiehofen indicates that in his attempt to get across he speeded at the rate of twenty to twenty-two miles an hour. One witness said that Wiehofen had about ten feet to spare and that the automobile which plaintiff's intestate was driving was about fifty feet behind. The train, by the uncontradicted evidence, was moving four or five miles an hour, so that it is apparent that plaintiff's intestate must have driven at a speed even greater than that of Wiehofen.

Not only does the evidence fail to show affirmatively that deceased was in the exercise of due care, but we think that on the contrary it affirmatively establishes his contributory neg-

ligence.

Much has been said in the briefs as to the ruling of the court refusing permission to the plaintiff, after the close of the evidence, to file two counts, in which an attempt was made to charge that the defendant was guilty of such wilfulness and wantonness as would preclude the necessity of showing due care. The defendant contends, assuming that these counts averred facts showing a cause of action for a wilful and wanton injury, that they stated a new cause of action which was barred by the statute of limitations. Plaintiff contends to the contrary, but it is not necessary to decide that point, as we are of the opinion, upon the facts as set forth, that there was no evidence from which a jury would have been justified in finding that such cause of action existed.

This point is discussed at greater length in case general number 30962, Minnie E. Walters, as Administratrix of the Estate of Alfred F. Walters, deceased, v. Chicago & Eastern Ill. Ry. Co. and Baltimore & Ohio Chgo. Terminal R. R. Co., in an opinion this day filed. That is a suit by the administratrix of Alfred F. Walters, who was riding with plaintiff's intestate at the time of the accident, in which he also was killed, and it is unnecessary to repeat in this opinion what is there stated with reference to facts necessary to constitute a wilful and wanton injury.

We conclude that the court, in view of the evidence, was obliged to instruct the jury in this case to return a verdict for the defendant, because there was no evidence tending to show due care on the part of plaintiff's intestate and because the facts proved fail to tend to establish that the injury sustained was wilful or wanton insofar as defendant was concerned.

The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

Ilgenau.

Each has also said in the hotels or in the privacy of the many relaxing privileges of the plaintiff, after the close of the evening, it like was always the case to be alone that the defendant was guilty of such willful acts and wantonness as would prevent the necessity of stopping for more. The testimony continues, mentioning that these certain unusual facts showing a cause of action for a willful and wanton injury, that they stated a fact having relation with the injury by the statute or limitations. Plaintiff contends in his brief, and it is his contention, that these facts, as we have of the evidence, upon the facts as set forth, that there was no evidence from which a jury might have been justified in finding that such cause of action existed.

This point is discussed at great length in some general counsel Bill, Clark v. Dalton, an insurance case of the Indiana of Alfred M. Waltman, decided, v. Pittsburg & Indiana City, Ry. Co. and Indiana & Ohio Ohio, Supreme C. Co., in an opinion this day filed. This is a suit by the administratrix of Alfred E. Waltman, who was riding with plaintiff's intestate at the time of the accident, in which he also was killed, and it is unnecessary to repeat in this opinion what the evidence in this case necessary to constitute a willful and wanton injury.

It needs that the court, in view of the testimony, was obliged to instruct the jury in this case in favor of the defendant, however there was no evidence tending to show that any of the acts of plaintiff's intestate and because the jury was called to pass on matters that the injury complained of was willful or wanton injury no recovery.

The judgment is therefore affirmed.

143 - 30962

MINNIE E. WALTERS as Administratrix of the Estate of Alfred F. Walters, Deceased,

Appellee,

vs.

CHICAGO & EASTERN ILLINOIS RAILWAY and BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD CO.,

Appellants.

243 I.A.618

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued as the administratrix of her deceased husband and recovered damages under the statute for injuries sustained by the deceased on July 3, 1924, from which he died.

Plaintiff's intestate was riding in an automobile driven by one Sanders, and while crossing the intersection of defendant's railway tracks with South Ashland avenue the automobile was struck by cars of a train of defendant, which was then being pushed in an eastward direction over the crossing.

Sanders, the driver of the automobile, and plaintiff's intestate were both killed at that time.

The counts of the declaration alleged negligence in the management and operation of the train in failing to maintain a flagman at the crossing, in failing to warn, and in failing to provide a flagman, as required by statute, or an automatic bell, and also in failing to stop the train promptly.

Defendants filed pleas of the general issue, and the cause was submitted to a jury, which returned a verdict for plaintiff in the sum of $5,000, and in response to a special interrogatory answered that the deceased was not guilty of contributory negligence. The court, over-ruling motions to set aside the special findings for a new trial and in arrest, entered judgment for the amount of the

verdict.

In several of the counts of the declaration there was an attempt made to state a cause of action for wilful and wanton injury. Thus in the first additional count it was stated, "that defendants, and each of them, long prior to and then and there consciously, wilfully and wantonly refused and neglected to place and maintain, or cause to be placed and maintained, a flagman at said crossing in the daytime for the purpose aforesaid."

In the second additional count it was alleged, "that defendants, and each of them, in disregard and violation of the provisions of a certain statute known as 'An Act concerning public utilities,' long prior to and then and there consciously, wilfully and wantonly refused and neglected to place and maintain, or cause to be placed and maintained, a flagman at said crossing in the daytime for the purpose aforesaid."

In the third additional count it was alleged, "that defendants, and each of them, long prior to and then and there consciously, wilfully and wantonly refused and neglected to install and maintain, or cause to be installed and maintained, such an automatic bell contrivance at said crossing for the purpose aforesaid, or any other equivalent device."

The fourth additional count alleged, "that defendants, and each of them, not regarding, and in violation of, a certain statute known as, to-wit: 'An Act Concerning Public Utilities,' long prior to and then and there consciously, wilfully and wantonly refused and neglected to install and maintain or cause to be installed or maintained, such an automatic bell contrivance at said crossing for the purpose aforesaid, or any other equivalent device."

In an additional count filed May 2, 1925, it was alleged that plaintiff in the exercise of ordinary care could have stopped the train in time to have avoided injury to the deceased, and "plain-

tiff alleges that said C. & E. I. Ry. Co. then and there recklessly and wantonly ran the said train against said motor vehicle and pushed said motor vehicle along the track in front of said train a great distance, to-wit: 100 feet; and the plaintiff further alleges that as a direct and proximate result, and in consequence of said C. & E. I. Ry. Co's reckless and wanton conduct, deceased was thrown from said motor vehicle and was run over by said train," etc.

At the conclusion of the evidence for plaintiff and again at the conclusion of all the evidence, there was a motion by the defendants for an instructed verdict, which was denied.

The cause was tried by the court and submitted to a jury upon the theory that the evidence was of such a nature as to raise an issue to be determined by the jury as to whether the injury which resulted in the death of plaintiff's intestate was wanton and malicious on the part of the defendant.

Thus in the tenth instruction, given at plaintiff's request, the jury was told that, "In one count of the declaration it is alleged, in substance, that the defendant, Chicago and Eastern Illinois Railway Company, was operating the train up towards, close to and about to pass over the crossing in question; and that at the same time the person in charge of the automobile was operating the automobile up towards, close to and about to pass over said crossing; and that neither deceased nor the person in charge of the automobile knew of the approach of the train to the crossing; and that by means of the premises, there was imminent danger of the train colliding with the automobile at the crossing; and that the said defendant then and there knew, or by the exercise of ordinary care would have known of the alleged facts thus stated; and that by means of the premises, ordinary care upon the part of the said defendant required that it should promptly stop said train, and that by the exercise of ordinary care it could have stopped the train in time to

have avoided deceased's injury and death; yet that the said defendant then and there recklessly and wantonly ran the train against the automobile and pushed it along the track in front of the train at a great distance; and that as a direct and proximate result, and in consequence of said defendant's said alleged reckless and wanton conduct, deceased was thrown from the automobile and sustained bodily injuries from which he died. If you believe from a preponderance of the evidence that the said defendant was guilty of reckless and wanton conduct as so alleged, and that as a direct and proximate result thereof deceased sustained injuries from which he died as so alleged, then and under such circumstances, the fact, if it was a fact, that deceased did not exercise ordinary care for his own safety would not be a defense to this suit."

The defendants tendered to the court, with a request that it be given, an instruction to the effect that although the jury should believe from the evidence, under the law as stated in the instructions of the court, that the defendants were, or one of them was, guilty of negligence as charged; that if they further believed from the evidence, under the instructions of the court, that plaintiff's intestate, by using his faculties with ordinary and reasonable care in looking out for dangers could have avoided the accident, and that he negligently failed to do so, and that such failure caused or proximately contributed to cause the accident which resulted in his death, then the plaintiff could not recover.

This instruction the court refused to give, but modified it by adding thereto the following clause:

> "Unless, however, you find from a preponderance of the evidence that just at and immediately prior to the happening of the accident, the defendant, Chicago and Eastern Illinois Railway Company, was in the operation of the train in question, was guilty of wilful and wanton negligence as charged in the declaration."

In an opinion this day filed, Sanders v. Chicago and Eastern Illinois Railroad Co., case number 30927, we have described

in detail the circumstances and conditions under which this accident happened, and affirmed the judgment of the trial court entered upon an instructed verdict for the reason that the plaintiff in that case failed to show by affirmative evidence that her intestate at the time of the accident which resulted in his death was in the exercise of due care and caution for his own safety.

Reviewing the evidence in that we case, we also have held that no facts appeared therein from which a jury could reasonably find that the defendant was guilty of inflicting a wanton and wilful injury.

The facts here are not materially different from the facts which appeared there; but as the controlling question, by reason of the giving of these instructions in this case, is whether there is any such evidence of wanton and wilful injury in the record, we have deemed it proper to here set forth the facts upon which our conclusion is based.

It will therefore be unnecessary to discuss in this opinion the question of whether the record contains any evidence tending to show that plaintiff's intestate was in the exercise of due care, and as to the question of the negligence of the defendant, we will only state in this opinion, as in the Sanders case, that the court is of the opinion that irrespective of the question of due care, there was evidence from which a jury might reasonably find negligence on the part of the defendant railway company.

That question, however, becomes immaterial on this record as we view it, if there was in fact no evidence from which a jury could reasonably find that the injury which plaintiff's intestate sustained was a wilful and wanton one.

This court has held in many cases that it is reversible error for a trial court to submit an issue in an instruction to a jury when there is no evidence in the record upon which to base it.

W. Chicago Ry. Co. v. Raftrey, 85 Ill. App. 319; I. C. Ry. Co. v. Bundy, 97 Ill. App. 202; Vaughn v. I. C. Ry. Co., 201 Ill. App. 241; Gehrig v. C. & A. R. R. Co., 201 Ill. App. 267; and the Supreme Court of this state in M. & O. R. R. Co., v. Godfrey, 155 Ill. 78, has approved of the same rule.

The defendants contend persuasively that the counts to which we have referred do not set up a cause of action for wilful and wanton injury, relying upon Harris v. Piggly Wiggly Stores, 236 Ill. App. 398.

This court is disposed to adhere to the rule announced in that decision, but in view of the conclusion at which we have arrived after considering all the evidence, we are disposed to place our decision upon that ground rather than to dispose of a case of this importance upon any technical question of pleading.

We will briefly recite the evidence tending to show the actual circumstances under which this accident occurred. It took place on July 3, 1924, a little after one o'clock p. m., at the intersection of South Ashland avenue, a public street running north and south, with West 135th street, a public street running east and west.

This place is outside of the city of Chicago, and near this intersection Ashland avenue crosses at grade four railroad tracks which run in a general easterly and westerly direction. East of Ashland avenue is a switching yard, and some of the switches were very close to the east side of Ashland avenue; other switches that connected certain of the main tracks by means of cross-overs were situated west of Ashland avenue. In a general way there was a considerable number of trains and cars passing over this crossing, and there was considerable switching and shunting of cars back and forth over these different tracks.

From 300 to 400 feet south of the crossing and just east of Ashland avenue was located the plant of the Illinois

Brick Company, at which the plaintiff's intestate Walters, as also the driver of the automobile at the time of the injury, Mr. Sanders, worked. The roadway led from the yards of the Brick Company to Ashland avenue. Both Walters and Sanders had worked for the Brick company for many years and were thoroughly familiar with the situation at the point where the accident occurred. West of Ashland avenue, on either side of the crossing, was open farm country, and any one coming out from the plant of the Brick company and turning to go north along Ashland avenue, as Sanders and Walters did, at all times had a clear and unobstructed view of the tracks in front of and to the west of them for the distance of a mile or two. In the early and latter parts of the day there was considerable travel upon Ashland avenue. Defendants kept no watchman or flagman at the crossing; there were no gates and no automatic bell. There was no ordinance by the Illinois Commerce Commission or statute of the state requiring that a flagman should be kept there, or that gates or bells should be maintained.

Ashland avenue at this place was sixty feet wide, and that part of the street which had been improved was about thirty feet wide. It was not paved but was macadamized. At and just prior to the accident there were no other engines or cars moving near the crossing than those of the train that struck the automobile in which plaintiff's intestate was riding.

The train consisted of twenty-five loaded and two empty cars, with the engine and tender. It had just before been switched west across Ashland avenue, and at the time of the accident was being pushed along the southerly track from the west toward the crossing at a speed of from four to five miles an hour.

There is a conflict in the evidence as to whether the movement of the train before it reached the crossing was continuous, plaintiff maintaining that the evidence tends to show that some

distance west of the crossing the train came to a full stop, but we think that question immaterial.

Sanders and Walters having finished their work at the plant of the Brick company, started back in a Ford automobile in the direction of the crossing. They were preceded by one Wiehofen, an employee of a different concern, who had left first and drove out of the yard of the Brick company plant into Ashland avenue, then north along Ashland avenue and over the crossing, travelling at a speed of ten or twelve miles an hour. Sanders and Walters followed some distance behind, traveling at about the same rate of speed.

Wiehofen testifies that as he approached the crossing the train of cars to the west of him appeared to be standing still, about twenty feet from Ashland avenue; that when he got on the tracks he glanced to the west again, then for the first time saw that the cars were in motion; he thereupon stepped on the gas and barely succeeded in getting across. Sanders and Walters following a few feet behind were struck by the train, which pushed the automobile in front of it and moved after striking a distance variously estimated at from 90 to 150 feet before stopping.

This train was a transfer or switch train, consisting of 27 box cars, 25 loaded and two empty cars, with the switch engine coupled to the west end of the train, the front of the engine being next to the cars. As this engine backed westward hauling the cars, the conductor alighted from the train at the yard office, some 500 or 600 feet east of Ashland avenue on the north side of the tracks. The switchman remained on the train until it had proceeded westward far enough to clear the west cross-over switch, which is 449 feet west of Ashland avenue, where the train stopped. The rear switchman alighted from the train and threw this switch, and the engine commenced to push the train eastward. The rear switchman ran eastward ahead of the train and threw the other three cross-over switches

through which the train had to pass before reaching Ashland avenue. The train was being backed into the yard upon the signal of either the conductor or the yardmaster. The two switchmen, the engineer and the fireman formed the crew of the train, which was about 1100 feet in length. The head switchman testified positively that he saw the collision and that he at once gave the engineer an emergency signal to stop. The rear switchman also testifies that he gave the emergency signal to stop immediately after the collision, but plaintiff contends that there is evidence tending to show that the train ran two or three car lengths before the rear switchman signalled.

The engineer testifies, and his evidence is not contradicted, that he first saw the signal of the rear switchman; that upon getting the signal he applied the air, heavy service and emergency; that all the cars were coupled up with air, controlled by what they call the engineer's brake valve in the cab beside him; that when he received "this washout signal, as we called it," he took the handle that applied the air and put the train in emergency; that that practically draws a majority of all the air in the train, causing all the cars in the train to stop automatically, and that after he applied that emergency he made a good stop.

The engineer says that he had been an engineer for a good many years and had experience in stopping trains of all sizes and lengths by the air or automatic signals, and that with 27 cars he could make an emergency stop in about two car lengths; that he could not bring it down shorter because of the weight of the train; that if he had 27 empties he could have made a quicker stop; that he had a full throttle of steam shoving into the yards, and that slack had something to do with it; that slack is the lost movement between the cars and the drawbars; that in a train of about that length there is from 27 to 35 feet of slack, by which he meant

the cars were pushing back and shoving together; that the brakes are first set gradually from one car till the last car, so that the last car probably moved 27 feet farther than the first one; that it takes all that time for the air to be drawn off the train; that the engine does not stop immediately; that it will depend on the speed of the train; that it would stop quicker at two miles than it would at ten or twelve.

On cross-examination he said that he had testified at the inquest that he did not remember the exact feet; that he knew it was within a car length or two; that he did not remember at the inquest that he received a violent signal from the rear brakeman and applied the brakes in emergency and stopped the train within about a car length and a half, - fifty or sixty feet. He said that everyone of the cars was coupled up; that when he got an emergency signal he moved the engineer's brake valve, and that instantly reduced the pressure the same as if the hose was broken; that supposing a train of 1,000 or 900 feet in length and a man opened a cock full in the rear end, you would feel almost instantly the lowering of the pressure in the cab because the rear end sets first. He explained that he was figuring on a whole train line when he said instantly; that if a man on the rear cars opened the air cock, whether or not that reduces the air line depends on how far he opened it; that the air does not get onto the end of the car at the same time of the opening of the opposite end; that as soon as it was opened it reduced the pressure in the pipe, but you cannot feel the reduction of the rear end to the engine in a second; that you feel it quicker in twenty than in one hundred cars because it takes much longer for the amount of air drawn off to refill where you draw it off the first time; that in twenty-seven cars there is a greater momentum than in one car; that there

is a brake on every car and every brake is self-operating; that whether there is one car or twenty cars, from the moment the brake is set each car will stop as though there were not another car in train; but not at the same time; that when you draw air from the rear naturally the brakes will set first; that with a pipe line of 800 feet it would take four or five seconds before that pressure is reduced on the last car; that as the pressure goes down the line the brake on every car sets, but not as soon as you open it. He says, "I set this brake as soon as I got the signal from the man on top of the rear car. I didn't know anything had occurred till I got that signal. I couldn't make any step until I got a signal." He says that at that time his train was running about five miles an hour; that the man on top of the car, swinging his hands, gave him the "washout;" that they were on level tracks and dry rails; that he had New York equipment, a standard brake, and that every car in the train was equipped with a brake; that he shut off the steam, but still had pressure on the cylinders; that applying the brakes didn't shut off the pressure; that with no steam applied, no pushing power, going four miles an hour, dry rail, level track, brake applied in emergency, he could stop the train in probably seventy feet or probably eighty feet. He says that a train of new cars will stop quicker than a train of old ones; that with a train of twenty-seven cars the last car ought to run about twenty-seven feet, figuring a foot of slack between each car; that the cars next to the engine set first, the pressure is reduced until it gets to the last car, and that last car will probably move about twenty-seven feet farther than the engine and the first car; that at the time he got the signal he had a full head of steam, working as hard as he could.

It is no doubt the rule, as plaintiff contends, that ordinarily the question of whether a given injury is one wilfully

and wantonly inflicted within the meaning of the law, is a question to be determined by a jury. Waldron Express Co. v. Krug, 291 Ill. 476. That rule is of course subject to the exception, as are all questions required by law to be submitted to a jury, that there must be some evidence from which a jury could reasonably find the ultimate fact upon which it must pass.

The argument for plaintiff asserts wilful and wanton misconduct on the part of defendant before the collision and after it.

The wilful and wanton negligence, which is asserted to have taken place prior to the time that the train struck the automobile, is based on the theory that the crossing was known to be a dangerous one on account of the congested condition of the traffic at that place, and it is urged that there was a question for the jury as to wilfullnes and wantonness on the authority of Barmier v. I. C. R. R., 296 Ill. 466; Brewer v. I. N. & W. R. R., 318 Ill. 20, and Brown v. Ill. Terminal Co., 319 Ill. 326.

The Public Utilities Commission had declared this crossing to be a dangerous one and had directed that stop signs be placed at it, and this rule of the Public Utilities Commission seems to have been complied with. There was evidence tending to show that there was at times a congestion of traffic there, but the undisputed evidence is to the effect that there was no congestion of traffic at the particular time this accident occurred.

The courts have said that it is extremely difficult to define what wilful and wanton conduct is, but, whatever it may or may not be, it is clearly not simply negligence. An act in order to be wilful and wanton must be intentional, although, as the cases which the plaintiff here cites show, intentional wrong may be inferred from conduct which is so reckless or grossly negligent that an express intention to wrong may be inferred from it. Such have been the facts appearing in cases where a train of cars has been run over

a crossing at such a reckless speed as would tend to show a disregard for the lives of those who (there was reasonable cause to believe) might be on the crossing, and this is the principle upon which Bremer v. L. E. & W. R. R., supra, and Brown v. Illinois Terminal Co., supra, were decided. Thus in Brown v. Illinois Terminal Co., supra, the court says:

> "A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care."

That element is wholly lacking in the evidence which was here submitted to the jury. There is not a scintilla of evidence tending to show any intention to injure plaintiff's intestate, and there is no evidence from which a jury could reasonably find that the moving of a train of cars over a crossing, at the rate of four or five miles an hour, where there was no congestion of traffic and where there was no obstruction of the view of pedestrians, could be held to constitute such recklessness as would justify a finding of wilful and wanton injury. Negligence there may have been. At least, we think, there is a question under the evidence which would justify the submission of that matter to the jury, but no reasonable man can say that the conduct was wilful and wanton.

This court recently thoroughly discussed this question of wilful and wanton conduct in Harris v. Piggly Wiggly Stores, supra, and is disposed to adhere to the views on that subject expressed in that opinion.

The argument that there was a question of fact as to wilfulness and wantonness on the part of the defendant after the train struck plaintiff's intestate is likewise without any basis in the evidence. The testimony of the different witnesses shows opinions varying as to the distance which the train ran after it

struck the automobile, the estimates varying from 90 to 150 feet. The plaintiff suggests several respects in which it might be argued that the stop could have been made quicker and suggests that either the signal was not given as soon as it should have been, or that the engineer was negligent in not receiving it sooner.

It would be novel indeed for the court to hold that while the crew of a moving train was without question trying to stop it, they were nevertheless guilty of inflicting a wilful and wanton injury because they were not able to stop the train sooner. The element of intentional wrong, either expressed or implied, is wholly absent from the evidence and there was therefore nothing to submit to the jury, or which should have been submitted to the jury, on that question.

For the error in these instructions the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

145 - 30964

5626a

LONDON GUARANTEE & ACCIDENT CO., LTD., a Corporation,
Appellant,

vs.

J. WEINER, Trading as Liberty Cleaning Company,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

243 I.A. 618

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In a trial by the court there was a finding for plaintiff and judgment in the sum of $65.75. The plaintiff appealed from this judgment, its motion for a new trial having been over-ruled.

The claim of the plaintiff was for the total sum of $301.01 on account of premiums alleged to be due for certain insurance policies issued by plaintiff to defendant at defendant's request. The only questions argued relate to the premium on a compensation policy, No. FR363810, for which a premium was claimed, amounting to $235.26. The part of the claim based on this policy was disallowed.

The evidence tends to show that the policy in question was obtained through a broker, who informed defendant that it would cover damages sustained by employees of the defendant who might be engaged in window cleaning work. The defendant was engaged in this business and had a prospective customer, the Adams & Westlake Co., whom it solicited. The representative of that company, Mr. Brassil, testified that in the course of their negotiations he asked the defendant if the defendant carried workmen's compensation and that defendant answered yes, that he carried such insurance with the plaintiff. Thereupon Mr. Brassil wrote a letter of the plaintiff in order to verify this statement.

2431.A. 318

The letter was written on or about March 25, 1924. There appears in evidence a letter from Conkling, Price & Webb, general agents for the plaintiff, dated April 2, 1924, and directed to the defendant, in which letter it is stated that they had received a letter from the Adams & Westlake Co. requesting advice as to coverage on "window washing" under the policies carried by defendant. They said, "Beg to advise that when your insurance was submitted to us, we had no knowledge of any 'window washing' and in fact the policy does not show a classification for this kind of work. On 'window cleaning' risks we require a rate of $12.03 with a minimum charge of $1,000.00." The letter further states that the writers appreciate that the premium requested is high and that they do not think that defendant will be interested in the policy on that basis, and under the circumstances ask that defendant return the policies which he held and that they would terminate them on a pro rata basis. It further states that they had not replied to the letter of Adams & Westlake Co. This letter, which is very important, is not mentioned in the abstract furnished by the plaintiff.

The evidence further tends to show that defendant did not get any window cleaning business from the Adams & Westlake Co., and that the reason he did not was this construction of the compensation policy by the agents of plaintiff.

The policy does not expressly assume liability as to window washing, but the plaintiff now contends that under certain decisions of the Supreme Court cited by it, in particular Amalgamated Roofing Co. v. Traveler's Ins. Co., 300 Ill., 487, it would have been liable to pay such compensation, and that the defendant is therefore obligated to pay this premium. Plaintiff cannot blow hot and cold in this manner. Whatever our conclusion might be as to whether plaintiff would have been liable upon the policy in the

manner indicated, it cannot be permitted to urge that construction, plaintiff having construed the policy otherwise and the defendant having acquiesced in its construction.

No reason has been shown for reversing the judgment and it is affirmed.

AFFIRMED.

McCurely, P. J., and Johnson, J., concur.

178 - 30994

563 fa

HARRY M. ENGLESTEIN and
LOUIS ENGLESTEIN, Co-
partners Doing Business as
HARRY M. and LOUIS ENGLESTEIN,
Appellees,

vs.

ROYAL FURNITURE AND CARPET CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

243 I.A. 618

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant, Royal Furniture and Carpet Co., on or about September 10, 1923, sold to one Sam Phillips, the business theretofore conducted by it at 6308 South Halsted street, the property consisting of a warehouse, certain merchandise and book accounts.

The warehouse was sold for $20,000, the merchandise for $33,000 and the book accounts of a face value of $52,000 for 82½ of the face amount thereof.

The plaintiffs, who are real estate brokers, claimed a commission at the rate of five per cent. upon these sales, making an entire demand of $6250. Defendant denied its liability in its affidavit of merits, asserting that an agency theretofore given to the plaintiffs by defendant had been terminated and revoked prior to the time that negotiations began with Phillips.

The cause was tried by the court. There was a finding against defendant in the sum of $5650, apparently made up by allowing a commission of three per cent on the sale of the warehouse, amounting to $600, five per cent on the merchandise amounting to $2650, and five per cent on the face value of $52,000 of book accounts, amounting to $2600. Upon this finding judgment was entered in favor of plaintiffs and against the defendant.

The defendant contends that the court erred in excluding certain testimony offered by it, but the facts which defendant sought to prove by this offered evidence insofar as the same were material to the issues, were established by other evidence and uncontradicted. Therefore, even if it is conceded that the court erred, we think the error was not reversible.

The principal error assigned and argued, however, is that the court did not find that the authority of the plaintiffs as brokers for the defendant had been revoked prior to the sale of defendant's business. Defendant requested the court to find that such authority had been revoked, and the court refused the request. The finding of the court in this respect is entitled to the same weight in this court as the verdict of a jury, and we will not set such a finding aside unless it is clearly and manifestly against the weight of the evidence.

The briefs of the parties argue this question at length, pointing out the evidence upon which they rely for their respective contentions, together with the inferences which they insist should be drawn therefrom.

As it is conceded that the plaintiffs had an agreement whereby they were given the authority to make a sale and under which they would be entitled to receive commissions, it is apparent that the burden of proof is upon the defendant to establish by a preponderance of the evidence that such authority was revoked.

The evidence in the record which bears upon this point consists of the testimony of witnesses to oral conversations between the parties and other facts which appear in the evidence. The defendant testifies positively that on August 17th, prior to the sale (when one of the plaintiffs submitted a proposition for the purchase of this property, which was declined by defendant) Mr. Freudenthal, who represented the defendant company, told Mr.

Englestein in substance that the services of the firm would be thereafter dispensed with. Mr. Freudenthal's testimony as to this conversation is corroborated by the testimony of Mr. Mahornay, an old friend of Mr. Freudenthal, who says that Mr. Freudenthal at that time told Englestein that he would not go through with a sale of the property upon certain terms which Englestein was pressing him to accept, and that Mr. Freudenthal said that their relations or connections were finished; that they were through with their business relations.

Mr. Freudenthal also testifies to a conversation with Mr. Englestein on September 10th in the presence of Mr. Lowenthal, nephew of Mr. Freudenthal, at which time Mr. Englestein notified Freudenthal that if a sale was made he would claim a commission. Lowenthal says that he was called into the room by Freudenthal, who asked him to make a note of Mr. Englestein's answers to certain questions which he, Lowenthal, did; that this was said in the presence of Englestein, and that Mr. Freudenthal then asked Englestein if at any time in the course of their conversation together, he, Englestein, had mentioned the name of Mr. Phillips as a principal, or in any other connection, and that Mr. Englestein said that he had not; that Mr. Freudenthal also asked Mr. Englestein if prior to that afternoon he had not told Mr. Englestein that he was through with him, and that Englestein said that Mr. Freudenthal had told him that, and that Mr. Freudenthal then said that would be all, and that the witness then made a note of the substance of the conversation immediately.

As to this last conversation, when we reflect that Mr. Englestein was then present at the office of the defendant company for the very purpose of making a claim for these commissions and that the evidence indicates that he is a well-informed, intelligent person, it seems highly improbable that any such con-

versation occurred, and it is apparent that the trial court did not believe that the witnesses gave an accurate account of this conversation.

The cross-examination of the witnesses for defendant tended very strongly to discredit their testimony. This court has said more than once that evidence is to be weighed and not counted, and, after a careful reading of the evidence in this case, we find ourselves wholly unable to assert that the finding of the court on the ultimate question of fact, which concerned the alleged revocation of the plaintiffs' authority, is against the weight of the evidence.

However, defendant further contends that under the agreement between the parties plaintiffs were not entitled to any commission upon the sale of the book accounts, the contention being that under the agreement between the parties these accounts were to be sold for a price that would net the defendant eighty-seven and a half cents on the dollar. The finding of the court indicates that a commission of five per cent was allowed upon the face value of these accounts, and this we think is clearly erroneous, as there is no evidence in the record tending to show an agreement by defendant to pay five per cent on the face value of the accounts, irrespective of the price at which the same should be sold. The defendant requested the court to find as a matter of law that the plaintiffs were not entitled to any commission on the accounts or bills receivable testified to in the case, and to find as to commissions claimed on that account, plaintiffs could not in any event be entitled to any. Both of these requests were refused.

The evidence tended to show that under the agreement as originally made, plaintiffs were authorized to sell the book

accounts at one hundred cents on the dollar and receive, as compensation therefor, five per cent commission. The evidence of Freudenthal is further to the effect that he afterwards authorized the sale by Englestein of the merchandise and the book accounts to separate parties at the price for the accounts of 87½ cents net to defendant.

Englestein's testimony is to the effect that an offer of 75 cents on the dollar having been made for the book accounts, which defendant, through Freudenthal, refused, Freudenthal then determined that he wanted 87½ per cent net to himself, and he gave instructions to sell the book accounts at 92½ cents on the dollar, plaintiffs to receive a commission of five per cent upon the face of the accounts and defendant to receive 87½ per cent of the face of them.

Freudenthal further testifies that he told Englestein that defendant would be willing to pay a commission if it received 87½ cents net.

The sale, it will be noticed, was made by defendant upon its own account and without consultation or other or different agreement with the plaintiffs. Plaintiffs therefore invoke the rule of law that where the seller consummates a sale upon different terms from those proposed to the broker, the broker will not thereby be deprived of his commission; citing Curran v. Rundell, 220 Ill. App. 584; Haffner v. Herron, 165 Ill. 342, and Henry v. Stewart, 135 Ill. 448.

The plaintiffs say that Freudenthal authorized defendant to sell the book accounts at a price equal to 92½ per cent of $52,000, and agreed to pay Englestein a commission of 5 per cent of $52,000 if the sale was accomplished; that defendant saw fit to sell directly to a customer of plaintiffs at a price of 87½ per cent, and that a mere matter of the reduction of the price

made by the seller to a customer of the broker wouldnot deprive the broker of his commission.

An examination of the cases on which the plaintiffs rely, however, fails to disclose that the rule there announced was applied where the contract between the broker and his client showed an agreement for a net price to the owner. The defendant says that by the fixing of a net price to the owner, all commissions to the broker are excluded unless a price in excess of the net price is obtained. The plaintiffs say that it is not apparent why they should undertake to sell the accounts at eighty-seven and a half cents on the dollar without receiving any commission therefor. However, the contract was an entirety, and if the deal went through as planned they would at any rate receive a commission on the sale of the warehouse and the merchandise and the agreement gave to plaintiffs the further opportunity of making a commission upon the sale of the book accounts in case they could be sold for more than eighty-seven and a half cents, net.

The evidence indicates that at the opening of negotiations of the sale of this property to Phillips, the defendant was not aware that he was in fact a customer procured by Englestein. We do not think, upon discovering that fact, defendant was bound to refuse to go on with the deal at the peril of paying a commission on the book accounts. Defendant received for the book accounts only the net amount which, under the agreement, the plaintiffs were to procure in case the same were sold. We do not think that defendant was liable for a commission on the book accounts, because there is no evidence in the record tending to show that he obtained more than 87½ cents on the dollar for the same, nor is there any evidence that the purchaser, Phillips, was ready, able and willing to pay more than that for them. Moreover, it appears that before the deal was consummated the plaintiffs knew

its terms and understood that defendant was to receive only 87½ cents on the dollar on the book accounts, but they made no protest nor produced any prospective purchaser willing to pay more for the accounts.

Plaintiffs had the opportunity of securing a better deal, if such was possible, but did not do so. We think, therefore, the item of $2600 for a commission upon the book accounts should not have been allowed, and that the proposition of law submitted by the defendant on that point should have been held. Reese v. Sprunance, 45 Ill. 308; Burnet v. Potts, 236 Ill. 499; Huddleson v. Wilen, 160 Ill. App. 134; Adams v. Kerfoot, 189 Ill. App. 211; 9 Corpus Juris, 881.

The judgment is therefore reversed. As the commission allowed upon the book accounts amounted to $2600, that amount will be deducted from the judgment and judgment entered here for the amount of commission allowed upon the sale of the warehouse and the merchandise, namely, $3250.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE FOR $3250.

McSurely, P. J., and Johnston, J., concur.

FINDING OF FACTS.

We find as facts that plaintiffs entered into an agreement with the defendant to act as agents in selling defendant's business consisting of merchandise, a warehouse, and book accounts of the face value of $52,000; that by the terms of the agreement defendant was to pay plaintiff a commission of three per cent on the sale price of the warehouse, five per cent on the sale price of the merchandise, and on the book accounts a commission of five per cent to be paid only in case these accounts sold at a price which, after payment of commission, would net defendant eighty-seven and a half per cent of the face value thereof; that plaintiffs produced a purchaser who bought the warehouse for $20,000, the merchandise for $33,000 and the book accounts for eighty-seven and a half per cent of the face value thereof; that the plaintiffs are therefore entitled to receive the sum of $600 as commission on the warehouse; $2650 for commission on the sale of the merchandise; and that the whole amount due to plaintiffs from the defendant for commission earned in said transactions is the sum of $3250, for which sum judgment should be entered.

199 - 31018

ILLINOIS GLASS CO., a Corporation,
Appellee,

vs.

HUMP HAIR PIN MFG. CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

243 I.A. 618

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of $9054.99, entered upon the finding of the court.

The plaintiff sued upon a written contract made on June 3, 1920, whereby the plaintiff agreed to manufacture and sell, and the defendant to purchase ten million Liberty Bell Hair Pin cartons, according to certain specifications at the agreed price of $1.84 a thousand, the stock to be of .014 Pt. White Patent Coated Board, printed in two color combination assortment, as per defendant's selection, after submission of proofs, five million of the assortment to be made up as soon as possible, plaintiff to buy stock for the total quantity listed after running half of the assortment of five million, balance to be made up as per revised specifications, which defendant agreed to furnish not later than six months from the date of first delivery.

Of the first five million, one-sixth was to be delivered as soon as ready and one-sixth each thirty days thereafter, or sooner, at defendant's option, first delivery to be made about four months from the date of order, materials and workmanship to be of standard grade, defendant to have the privilege of rejecting any defective cartons over 2½% cullage, which was stated to be the general practice of the trade.

The statement of claim averred that plaintiff purchased the necessary material for the manufacture of these cartons and manufactured and delivered to the defendant 1,246,595 of said cartons, which were accepted and paid for by the defendant; that thereafter plaintiff made up and tendered delivery of a further lot of 3,853,425 cartons which defendant refused and failed to take and pay for, and that there was due and owing in accordance with the terms of the contract the sum of $7090.30 for said undelivered cartons.

The statement of claim also averred that defendant did not furnish specifications for the manufacture of the last five million cartons; that plaintiff purchased the material for the manufacture thereof and had the same on hand for the purpose of furnishing the cartons in compliance with the terms of the contract; that by reason of the failure and refusal of defendant to give the necessary specifications, there was left unused on hand certain material which was about to become dried out and unfit for the purpose for which it was intended and to become entirely valueless; and the plaintiff, in order to minimize the loss, took the same over and used it at the market price thereof, namely, $70 a ton, which sum, amounting to $1406.16, plaintiff allowed as a credit against the price paid therefor, which was $3370.85, leaving a sum due on that account of $1964.69?

The defendant filed an affidavit of merits and also a claim of set-off, alleging that the defendant, relying upon the plaintiff to manufacture the cartons in accordance with the contract, ordered and received and paid for a large quantity of the same, which were to be used for packing the smaller cartons, that said cartons were especially ordered for the purpose of packing and shipping cartons to be so manufactured by the plaintiff, and that defendant paid therefor the sum of $6042.67, which was the fair,

reasonable and customary price; that plaintiff failed to comply with the contract and delivered to the defendant defective and unmerchantable goods, so that the defendant, after receiving and paying for 1,246,595 of said cartons, refused to accept further deliveries; that the defective merchandise so delivered to the defendant was unfit for the purposes for which it was intended; that defendant was damaged to the sum of the purchase price paid therefor; further that by reason of the failure of plaintiff to furnish cartons in accordance with the contract, the larger packing containers or cartons especially manufactured were and are useless and worthless to the defendant, and that it has suffered damage to the amount expended for the same, to-wit, $6042.67, making a total counterclaim of $8473.54.

Plaintiff filed an affidavit of defense to this counterclaim, in which it denied that it delivered defective and unmerchantable goods, or goods unfit for the purposes for which the same were intended, but on the contrary averred that plaintiff manufactured and delivered the 1,246,595 cartons described in the defendant's statement of counter-claim; that the same were manufactured and delivered in accordance with the contract and were received and retained by the defendant without objection for an unreasonable time after the delivery, and that said defendant accepted the same and thereby waived any objection.

The parties offered evidence in support of their respective contentions, and the court, at the request of the plaintiff, found as facts that the defendant paid for the goods which were actually shipped to and received by the defendant after the defendant had a reasonable opportunity to inspect and examine the same; that no notice was given to the plaintiff by the defendant within a reasonable time after opportunity to inspect, such as would negative the acceptance of the goods which were delivered;

that the defendant used a substantial amount of the cartons which were actually delivered to it; that approximately three and three-quarter millions of the cartons, constituting the balance of the first five millions of cartons called for by the contract, which were manufactured by the plaintiff, but which were not delivered to the defendant, were made in substantial compliance with the contract; that the defendant retained the cartons which were delivered to it for an unreasonable length of time after an opportunity to inspect the same, without objection thereto; that the defendant did not give notice in writing to the plaintiff of its objections to the cartons which were delivered, and that it did not give any notice in writing to the plaintiff of its objections to the goods which were manufactured for it, but which remained undelivered, and that such matter should be taken into consideration in determining whether or not any such notice was given by the defendant to the plaintiff of alleged defects in the cartons, as would entitle the defendant to claim damages as for a breach of contract respecting the cartons which were actually delivered, or to refuse to accept and receive the remaining cartons which the plaintiff manufactured for it.

The court further held as a proposition of law that the defendant must be deemed to have accepted the cartons which were actually shipped to it - that is, the first 1,246,595 cartons - if it did any act in relation to said cartons which was inconsistent with the ownership thereof by the plaintiff, and that if the defendant used a material portion of said cartons, such use by it was an act inconsistent with the ownership by the plaintiff, which must be construed to be an acceptance by the defendant of the cartons which were actually shipped; that the payment by the defendant for the cartons which were actually delivered to and received by it, after a reasonable opportunity to

inspect the same, constituted in law an acceptance of said cartons; and as to the cartons which were actually delivered to the defendant, if the defendant received and retained them without intimating to the plaintiff after the lapse of a reasonable time that the defendant rejected them, such action by the defendant would constitute in law an acceptance of the goods which were actually delivered; that unless the defendant had shown by a preponderance of the evidence that it gave notice to the plaintiff within a reasonable time after the cartons which were shipped to it were received, that some promise or warranty in the contract had been broken by the plaintiff, the defendant could not hold the plaintiff liable for damages for the breach of any such promise or warranty; that upon the neglect or refusal of the defendant to accept and receive the remainder of the first five million cartons which were manufactured for it by the plaintiff, it became and was the duty of the plaintiff to minimize the damages resulting by reason of such neglect or refusal; and that after such neglect or refusal by the defendant, the plaintiff had the right to take over at the then market price thereof, any paper board or other raw material which it may have bought for the purpose of manufacturing the second five millions of said cartons, or any part thereof, as provided by the contract, and to charge the defendant with the difference, if any, between the price which it paid for such paper board or other raw materials, and the market value thereof at the time of the defendant's breach; that before the defendant could recover as against the plaintiff, in any set-off to recover back the purchase price paid for the cartons which were delivered to it, or recover for any damages which it may claim to have suffered on account of any alleged failure by the plaintiff to furnish cartons in accordance with the contract, the defendant must allege in its statement of claim or set-off that it gave notice

to the plaintiff of such supposed defects; that if the defendant received the cartons which were delivered to it without giving notice to the plaintiff of the breach of any express or implied warranty under the contract within a reasonable time after the defendant knew or should have known of any such breach of warranty, such failure on the part of the defendant would prevent it from recovering from the plaintiff, under its set-off, any damages on account of any such supposed breach.

At the request of the defendant the court held as a proposition of law that under the contract if the plaintiff delivered to the defendant cartons which were not of standard quality or workmanship or were not of good and merchantable quality for the purposes for which they were intended, then the defendant was not obligated to accept and pay for the same; that if plaintiff, over a period from November, 1920, to September, 1921, delivered various cartons to the defendant, amounting to 1,246,395, the greater quantity of the same being delivered in February; and if an amount equal to sixty per cent of the quantity so delivered were not of standard quality or workmanship, or were not of good and merchantable quality for the purposes for which they were intended; and if the defendant notified the plaintiff that said cartons were defective and were not in accordance with the contract with respect to quality, as the deliveries were received, and also notified the plaintiff that it would not accept further shipments; and if the plaintiff requested the defendant to take certain of the cartons which were made up and use such as were of good quality, promising that the remaining cartons to be delivered would be of standard quality, both as to workmanship and material; and if the subsequent deliveries were no better than those preceding, then the defendant was legally justified in refusing to accept delivery of any more cartons, and that fact,

that it had received and paid for the 1,246,595, would not affect the right of the defendant to so refuse to accept the balance; that under the contract the cartons in question were to be delivered in installments, and if the defendant accepted certain installments which did not comply with the requirements of the contract with respect to the quality of workmanship and material, such acceptance was not a waiver of the defendant's right to reject subsequent installments; that under the contract plaintiff must establish by a preponderance of the evidence that the cartons delivered to the defendant, as well as those which remained undelivered in the possession of the plaintiff, were of standard quality, both as to workmanship and material, and were of good and merchantable quality for the purposes for which they were intended, and if the plaintiff fails to so establish such quality by a preponderance of the evidence, the finding should be for the defendant.

The defendant does not assert that any proposition of law as held by the court is erroneous. Its first contention is that the judgment should be reversed because it is manifestly against the weight of the evidence, and many cases are cited to sustain the proposition that the Appellate court will in such case reverse the judgment. There is no question about that proposition, but, on the other hand, it is also the undoubted rule that where, as here, a cause is tried by the court without a jury the finding of the court is entitled to the same weight in the Appellate court as is the verdict of a jury.

There was some conflict in the evidence as to whether the cartons delivered complied with the contract. The manager of plaintiff's carton department at the time the cartons were made, testified to the effect that he saw the order generally from first to last but not each of the shipments, not every one; that he did

not inspect all of the cartons; that he inspected them only occasionally; that he might be at the plant at nine o'clock in the morning and look at the cartons, and if the same were all right he would go away and come back at two o'clock. The defendant Goldberg testified to the effect that he had examined the cartons and the same were not standard grade and were defective, and defendant says this is uncontradicted and unimpeached in view of the partial inspection of the cartons to which plaintiff's witnesses testify. Plaintiff's witnesses did not say that they examined each one of the five million cartons, and it would not have added to the weight of their testimony if they had said so. The manager, as well as other employees of the plaintiff who were connected with the manufacture and delivery of the cartons, did testify to a general inspection and to facts tending to show that the cartons conformed to the requirements of the contract.

Moreover, the evidence also tends to show that these cartons were delivered to the defendant; that it used the same and paid for same in part; that it at no time made any complaint in writing as to the quality of the same. The testimony of Mr. Goldberg as to oral complaints in this respect is denied, and defendant does not argue that the finding of fact by the court on this issue is contrary to the weight of the evidence. Under the provisions of section 48 of the Uniform Sales Act, p. 2135, Cahill's Illinois Rev. Stat. 1925, this fact is controlling as to the cartons which were actually delivered. As to the cartons manufactured but not delivered, the evidence is uncontradicted that the same fulfilled all the requirements of the contract.

The defendant contends in the second place that the court erred in awarding the plaintiff damages for the unused material which it had purchased for use in performance of its contract with the defendant. The defendant argues that the damages

of the plaintiff on account of unused material would, under well recognized rules of law, be determined either as to the time of the breach of the contract or the time for its performance. 2 Sedgwick on Damages (9th ed.), sec.636d, p. 1249; Kingman & Co. v. Western Mfg. Co., 92 Fed. 486; Bagley v. Findlay, 32 Ill. 524.

Defendant points out that in the case at bar the contract was entered into on June 3, 1920, and that the time contemplated for the completion of the contract was not later than March, 1921; that the refusal of defendant to receive the balance of the cartons was made in September, 1921, and defendant says that if the plaintiff's damages were to be computed with reference to the date of that final refusal, or if they were to be computed with reference to the contemplated completion of the contract (particularly in view of the testimony in the record to the effect that the material would in a few months deteriorate) the plaintiff has not complied with any rule applicable by showing that it kept the material on hand not less than fourteen months, and then took the unused material at the then market price.

Plaintiff's statement of claim averred the purchase of the material for ten million cartons, and that after making the first five million, there remained on hand and unused 40,176 pounds of material which cost plaintiff $3370.85. It averred that in order to avoid the total loss and for the purpose of minimizing the loss, plaintiff took over and used this material at the market price, which was $70 per ton; that that was the fair and reasonable market value of the material, and that the same was allowed as a credit to the defendant. The affidavit of the defendant is not abstracted, and, under our practice, we will not therefore look to the record to reverse. However, an examination of this affidavit discloses that defendant did not take issue on any one of these material averments of fact set up in the plaintiff's statement of claim. Moreover, error is

not assigned on this finding of the court. This court does not reverse for an alleged error of the court on a matter which is not in issue and on which error is not specifically assigned. Aside from this, however, we are of the opinion that the evidence on this point was *prima facie* sufficient to sustain the finding of the court.

The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

265 - 31085

HENRY SCHRIK & COMPANY,
a Corporation,
Appellee,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a Body Politic and Corporate,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

243 I.A. 619

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued defendant in assumpsit, and its declaration alleged that the parties entered into certain contracts in writing whereby plaintiff was to do specified carpentry work on certain school buildings for a consideration named, the defendant agreeing to deliver to the plaintiff the buildings upon which said work was to be done upon specified dates in order that the work might be performed.

The declaration in its different counts alleged that defendant failed to deliver these buildings as agreed or to permit the plaintiff to remain in continuous possession of the same; that the work was thereby delayed to the damage of the plaintiff.

The original declaration consisted of four special counts, to which the common counts were added bith an affidavit of merits attached claiming damages in the sum of $11,595.12.

The defendant filed a plea of the general issue and an affidavit of merits asserting a defense to the whole demand. The affidavit of merits did not specifically deny the allegations of the declaration with reference to the delivery of the buildings and continuous possession of the same at the times agreed. Replication was filed and a jury impanelled on November 3, 1925.

On November 4th plaintiff by leave of court filed an additional count, to which, however, no affidavit of merits was

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attached, and on the same day the defendant, by leave, filed an additional affidavit of merits, alleging the delivery of the schoolhouses to plaintiff at the times agreed and that plaintiff had continuous and uninterrupted possession thereof.

At the conclusion of the evidence for the plaintiff, and again at the close of all the evidence, defendant moved for an instruction in its favor, which was denied, and error is assigned and argued on the denial of these motions.

The record is voluminous, but apparently there is no evidence in it tending to show that the buildings were not delivered at the times named in the contract. In the absence of such evidence it would seem that defendant was entitled to this instruction.

The theory upon which the motion for instruction seems to have been denied was that, as the original affidavit of merits did not put in issue the allegations of the declaration with reference to the possession of the buildings and as some evidence submitted in plaintiff's behalf had been taken before the amended affidavit of merits was filed, it was unnecessary for plaintiff to offer evidence tending to show this material fact.

On this point plaintiff cites Goddard Tool Co. v. Crown Electrical Mfg. Co., 219 Ill. App. 34; Redding v. Looney, 208 Ill. App. 413; Miller v. Thomas, 200 Ill. App. 128; Lyon v. White, 214 Ill. App. 232; Madison v. Fortune Bros. Brewing Co., 163 Ill. App. 276, and Hunziker v. Mulcahy, 215 Ill. App. 508. These cases construe section 55 of chapter 110 of the Practice Act and assert the general rule to be that the respective parties are limited in their evidence to matters set up in their affidavits of merits. That is ordinarily the rule in cases to which Section 55 is applicable, but assuming that said section is applicable to a case such as here is disclosed by the pleadings, there are

material facts from which the present case is easily distinguishable from those cited; in the first place, in that the additional count was not verified, and second, in that the court during the course of the trial permitted the defendant to file an amended affidavit of merits.

It was within the discretion of the court to allow or deny the motion for leave to file such an additional affidavit, but having permitted the defendant to file it, the court could not thereafter refuse to give the defendant the benefit of it.

Having permitted the defendant to file the affidavit denying that defendant had broken the contract by failing to give possession of the buildings, this cast upon the plaintiff the necessity of producing evidence sufficient at least to make a prima facie showing that defendant failed to deliver the buildings as agreed. There was no evidence tending to so prove.

The court therefore erred in denying the instruction requested for a directed verdict, and for this error the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

5642a

298 - 31121

NATIONAL SURETY COMPANY,
a corporation,
Appellee,

v.

W. M. SMITH, N. E. SMITH
and D. H. SMITH, copartners
doing business as Smith,
Hardy & Co.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

243 I.A. 619

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In the trial court defendants made a motion to strike plaintiff's second amended statement of claim. The motion was overruled and default of defendants for want of an affidavit of merits taken, and a judgment in favor of plaintiff for $500 entered, motions of defendants for a new trial and in arrest of judgment having been overruled.

Plaintiff has not appeared in this court to support the judgment, and the defendants contend that the judgment must be reversed, in the first place, because the court erred in denying the motion of defendants to strike the statement of claim, and in the second place because, while plaintiff sued as assignee, the affidavit required by Section 18 of the Practice Act, which is a condition precedent to the suit upon the assignment, is not in fact verified. Both points are in our opinion well taken. The motion to strike the second amended statement of claim was equivalent to a demurrer. (Chicago Railway Co. v. Morris, 203 Ill. App. 482.) The statement of claim discloses a suit to recover money which had been paid by plaintiff's assignors for a certain certificate of stock of the American Telephone & Telegraph Co. The stock stood in the name of

William F. Mahoney, and the theory on which plaintiff sought to recover was that the supposed signature of Mahoney to the assignment of the stock was a forgery. The statement, however, does not allege that the endorsement was false or forged in fact, but avers that the certificate was in due course presented to the transfer agent of the American Telephone & Telegraph Co. "who then informed the said Tobey & Kirk that the signature of the said William F. Mahoney was a forgery and not the signature of William F. Mahoney to whom the said certificate was issued."

It is apparent, we think, as defendants contend, that the mere averment, as here, that someone said that the endorsement was a forgery did not amount to an averment that it was in fact a forgery. (Lundahl v. Hansen, 46 Ill. App. 424.) On this ground alone therefore the motion to strike should have been sustained.

Section 18 of the Practice Act, supra, requires that an assignee of a non-negotiable chose in action may sue thereon in his own name, and that he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the bona fide owner thereof, and set forth how and when he acquired title. The affidavit, which was evidently intended to comply with this statute, is in the record, but does not appear to have been in fact sworn to.

For errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

37 - 30844

ARTHUR SCHILLER and
ROBERT SCHILLER, copartners
doing business as Arthur
Schiller & Son,
Defendants in Error,

v.

SIMON SACHS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

243 I.A. 619

MR. PRESIDING JUSTICE CRIMMIN DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment for $539.45, entered against him in the Municipal court on September 8, 1925, in a fourth class action in contract brought to recover the value of certain merchandise sold and delivered.

It appears from the judgment order that on plaintiffs' motion the court struck defendant's affidavit of merits and his plea of set-off from the files, and that the judgment was entered for want of an affidavit of merits of defense. No bill of exceptions is contained in the transcript, nor are any of the rules of the Municipal court before us. The question whether the court erred in sustaining plaintiffs' motion to strike defendant's pleadings and in entering the judgment, as urged by defendant's counsel, is not, in the absence of a bill of exceptions, properly before us. (Mann v. Brown, 263 Ill. 394, 398; Harmon v. Callahan, 286 Ill. 59, 63.) There is nothing contained in the record showing the grounds of plaintiffs' motion or of the court's action thereon (Sheppard-Strassheim Co. v. Nickas, 207 Ill. App. 370, 371; H & H Holding Co. v. W. A. Davis Lumber Co., 229 Ill. App. 409, 411); nor does the record disclose that after the court granted plaintiff's motion defendant asked leave to file amended pleadings. (Mann v. Brown, supra.) The judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

55 - 30870

243 I.A. 619

STEFAN KONRAD SASS,
Plaintiff in Error,

v.

ROBERT E. CROWE, State's Attorney,
Defendant in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

To a verified petition for mandamus, filed in the Superior court on November 7, 1925, wherein the petitioner, Sass, sought to compel Robert E. Crowe, as state's attorney of Cook county, Illinois, to sign two documents, viz, a petition to said court for leave to file an information in the nature of quo warranto, and such information, defendant interposed a general demurrer, and on December 19, 1925, the court sustained it, and, petitioner electing to stand by his petition, dismissed it at the latter's costs. It is sought by this writ of error to reverse the judgment.

In the petition for the writ it is alleged that Sass, by his attorney on October 27, 1925, presented to defendant the two documents (attached to the petition as exhibits A and B), requesting his signature thereto; that one is a verified petition (with certain other affidavits attached) addressed to said court for leave to file an information in the nature of a quo warranto, alleging that Kazimiera Sychlinski is wrongfully usurping the office of president of "Polish National Alliance," an Illinois corporation; that the other is such an information in the usual form; that in and by a letter (set forth in the petition) defendant on the following day returned the documents, refusing to sign

them; and that subsequently, upon presentation of similar documents to Oscar E. Carlstrom, attorney general of Illinois, that official also refused to sign them. After setting out paragraph 1 of the present Quo Warranto Act (Cahill's Stat. 1925, Chap. 112, p. 1914), the petitioner alleges that because of the statute it was the duty of the State's attorney to sign the documents, and that by reason of his refusal the people of the State and petitioner were deprived of their only adequate remedy against the usurpation of office by said Zychlinski.

In said Exhibit A it is alleged that the "Polish National Alliance" was incorporated in Illinois in 1896 under the provisions of an Act of the Legislature, passed June 22, 1893, providing for the organization and management of fraternal beneficiary societies, etc.; that the corporation has since been actively engaged in carrying on its objects, and, throughout the United States, has many groups or lodges, and a large membership; that every three years it holds a convention, made up of delegates from the different groups, at which time various officers, including that of president, are elected; that its 24th convention was held at Philadelphia from August 25 to 30, 1924; that both Sass and Zychlinski were duly nominated candidates for the office of president; that before the balloting commenced the convention had adopted certain rules of order (submitted by a Committee on Rules through its president) governing the manner of voting and the counting of the ballots; that it was provided that there should be a committee for counting the ballots, composed of 28 members and divided into four sections of 7 members each, that one of the members of each section should be known as the vice-president and should preside over it, count the votes of his section and

tabulate the result on tally sheets, that there should also be a president of the entire committee, and that, upon the completion of the counting and tabulation, he should sum up the results of the various tally sheets and report the result to the House of Delegates (i. e. the Convention) over his signature; and that it was further provided in the rules, as follows:

> 4. All controversies arising in connection with the right to vote or the counting of ballots or other matters associated therewith, shall in the first instance be decided by a body composed of the following members (six persons): The President of the Committee of Rules of Order; the President of the Committee on Voting and the Vice-President of sections of said Committee on Voting. All appeals from the decision of this body shall be made directly and immediately to the House of Delegates.
>
> 5. All appeals to the House of Delegates must be in writing, signed by the contestant and must contain the following:
>
> (a) A short and clear summary of the matter in dispute.
> (b) The decision of the body from which the contestant appeals;
> (c) The grounds of appeal;
>
> 6. All contests and appeals must be brought before the House of Delegates orally at once and must be filed in writing in accordance with the requirements of Paragraph 5 within fifteen minutes after the announcement of the decision, unless the House of Delegates shall for sufficient grounds grant a longer time. The decision of the House of Delegates is final.

It is further alleged in Exhibit A that, in accordance with the rules, the four sections of the committee for counting votes, together with a president of the entire committee, were duly appointed; that the convention proceeded to ballot for president and other officers, and, after taking the last ballot, the four sections proceeded to count and tabulate the votes; that during the counting "errors were made," in that certain votes cast for Sass for president were by certain sections "wrongfully credited" to Zychlinski; that "protests were immediately made to one Frank Wiernicki," who had been duly appointed as president of the Committee on Voting; that Wiernicki "made investigation" and "found that certain votes cast for Sass had been credited to Zychlinski,"

and "ordered the same corrected;" and that, upon completing the count, "the totals of said four sections showed 220 votes cast for Zychlinski and 217 votes cast for Sass." (These allegations of the petition are uncertain, in that it is not stated, after Wiernicki had "ordered the same corrected," whether the correction was made, and whether, if made, the total votes stood as stated, or whether said totals were the totals without correction.)

It is further alleged that Sass "immediately protested" to Wiernicki that votes had fraudulently and illegally been credited to Zychlinski instead of to Sass, and that, "Wiernicki immediately ordered a recount of all of said ballots." (The petition does not state that Sass in the first instance, or at any time, submitted his protest, or the controversy which had arisen, to the body, composed of six persons, as mentioned in paragraph 4 of the rules.)

It is further alleged that Leon Mallek had been appointed attorney for the corporation with power and authority to advise its members and the convention as to the legal rights, powers and liabilities of the members, their committees and the convention; that Mallek, conspiring with others to wrongfully deprive Sass of a just count of the votes cast, and well knowing that certain frauds, errors and mistakes had been made, advised Wiernicki that he had no power to order a recount, but should first report the results to the convention and that thereafter a recount should be had of the votes cast for any offices upon which a protest had been filed; that pursuant to this advice the result of the balloting for president "was reported" to the convention, viz, 220 votes for Zychlinski and 217 votes for Sass; that Sass immediately protested verbally, and also filed with the president of the convention his protest in writing, in accordance with the

provisions of said rule 5, which written protest was read to the convention;" that thereupon Mallek, in contradiction to his prior statement, "announced to the convention that the constitution and by-laws of the corporation did not provide any means of ordering a recount and that the house of delegates (the convention) had no power to order the same;" that thereupon the convention voted to approve the report of said election committee, and, by virtue thereof, "Zychlinski was declared duly elected president of the corporation for a term of three years;" that Mallek's announcement "was untrue and in violation of the constitution, by-laws and rules of order governing said elections;" and that it "in legal effect prohibited and prevented said convention from expressing its true wishes and desires" and that its action in so approving the report of the election committee "was not in effect the act of the convention but the act of said Leon Mallek," - resulting in a denial to petitioner "of his rights as guaranteed him under said constitution and by-laws." (There is nothing contained in the petition showing wherein Mallek's announcement was untrue, or in violation of the constitution, by-laws or rules of the corporation. The statements of the pleader in these particulars are mere conclusions. The alleged violated provisions of the constitution and by-laws are not set forth. Furthermore, no facts are alleged showing that, when the convention declared that Zychlinski had been duly elected as president, its declaration and decision did not reflect its true wishes and desires. Furthermore, under the provision contained in paragraph 6 of the rules, its decision "is final.")

It is further alleged that, by a provision in the constitution of the corporation, the "Censor" is the highest officer, and he together with certain other named officials constitute the "Supervisory Council," of which he is ex-officio chairman, and

said Council "has power to question and suspend the operation of resolutions of the central government;" that after the closing of said 24th convention, petitioner, on September 9, 1924, made written application to said Censor for a recount of the ballots, to which application was attached an affidavit of one Magdalena Milewski (application and affidavit attached to the petition as Exhibits 1 and 2); that thereafter the Censor "refused to order a recount;" that the ballots and tally sheets were at that time, and still are, held sealed and intact by the president of the convention; and that in the constitution of the corporation is contained the following provision:

> "No member, officer, group, committee, commission, department or part of the Alliance, shall have the right to apply to the courts of the land in matters relating to the Alliance, or any of its parts whatsoever, without first exhausting all the judicial and appellate tribunals in the Polish National Alliance, including the Convention."

It is further alleged that Sass "has exhausted" all said tribunals and "all means given to him by its constitution, by-laws and rules" for the purpose of obtaining a recount of the votes, but without avail. (We regard this allegation as a mere conclusion, not supported by allegations of facts. Except as above stated no provisions of the constitution, by-laws and rules are set forth, and it cannot be determined from the face of the petition whether petitioner did in fact exhaust all judicial and appellate tribunals of the corporation, and all means given to him by the constitution, etc., in his endeavor to obtain the recount.) It is further alleged that, either through fraud or error "numerous" votes were counted for Wychlinski by the election committee which should properly have been counted for Sass; that, had all the votes been properly counted, it would have been shown that Sass had been elected, instead of showing his defeat by three votes; and that in support of these allegations petitioner

attaches to his petition, as exhibits 3, 4 and 5, the affidavits of said Wiernicki, Agnes Cielewicz, a delegate and watcher, and Anna Petyk, a member of the first section of said Committee.

All of these affidavits were sworn to at Pittsburgh, Pa., on April 25, 1925, (nearly eight months after the adjournment of the convention) and they are all to the effect that there were irregularities in the counting of votes by the election committee, and that they believe that in certain sections of the election committee, particularly section 1, some votes were credited to Zychlinski which should have been credited to Sass. To the same effect is the affidavit of Magdalena Milewski (exhibit 2) sworn to at Chicago on September 8, 1924, and which accompanied Sass' refused application to said Censor for a recount, as above mentioned. In the affidavit of Wiernicki he states that during the counting of the ballots Magdalena Milewski, a candidtate for Lady Vice-President, informed him that in section 1 she and said Sass "were being cheated out of votes," and that he received similar complaints from Sass and other candidtates; that he "ordered a recount" but that Leon Mallek "would not permit a recount" and advised affiant that he "make the report to the convention;" that, acting on such advice, affiant did so; and that afterwards the requests of Sass and others for a recount "were refused by the convention, acting on the opinion of Mallek." For aught that appears to the contrary in this and the other affidavits the charges of irregularities and fraud were fully presented to the convention and decided by it adversely to Sass. Furthermore, the charges contained in the affidavits are not "full and positive," and are so vague and uncertain on material points that, if false, perjury could not be assigned thereon.

It is first contended by counsel for petitioner that, where a petition for the institution of a quo warranto proceeding

is in proper legal form and discloses a *prima facie* case involving *private* rights, the State's attorney, under our present *quo warranto* statute and the decisions of our Supreme Court construing it, upon presentation to him of such a petition, is required to sign it and, if he refuses, a writ of *mandamus* may issue to compel him to do so. These propositions are virtually conceded by respondent, where such petition is in proper form and discloses a prima facie case. In *People v. Healy*, 330 Ill. 280, 290, it is said: "When the legislature extended the right to private individuals to assert private rights by this proceeding, it is apparent that it was intended that they should have an opportunity to seek redress for their wrongs by making application to a court, or judge thereof, for leave to file an information. The duty resting upon the State's attorney to sign and present a petition for leave to file an information in the nature of a *quo warranto*, where evidence of facts is properly presented to him by a proposed relator which shows *prima facie* that the relator is legally entitled to the relief, in reference to a private right, which would be afforded him by a judgment in his favor in a *quo warranto* proceeding, is an absolute one. It follows, therefore, that where he declines to act for any reason *other than* that the facts, evidence of the existence of which is presented to him, do not warrant the relief which the proposed relator seeks, or that the petition and affidavit or affidavits presented to him are not in proper legal form, his declination is an abuse of his discretion. * * *." And it is further said (p. 296): "In cases, however, where the proposed relator has an individual and personal right, distinct from the right, if any, of the public, which is enforcible by a proceeding in *quo warranto*, and where he presents to the State's attorney a proper petition for his signature with evidence of the facts necessary to establish the right, it is the

duty of that officer to apply for leave to file an information in the nature of a quo warranto, and if he refuses when the matter is properly presented to him, he may be compelled by mandamus to sign and file the petition for leave." These holdings have been followed in People v. Healy, 251 Ill. 629, 634; People v. Mayran, 256 Ill. 151, 156; People v. Moss, 286 Ill. 589, 591; People v. Barber, 289 Ill. 586, 588.

It is further said in the first mentioned Healy case (p. 297): "The practice which may be followed by one who desires to become relator is to present to the State's attorney a petition addressed to the court * * for leave to file an information in the nature of a quo warranto, which petition should be so drawn as to be ready for filing when the signature of the State's attorney is thereto attached. As was suggested in Cain v. Brown, supra, (111 Mich. 657), the affidavit or affidavits accompanying the petition must be full and positive and must be made by a person or persons knowing the facts, and be drawn in such manner as that perjury may be assigned thereon if any material allegation contained therein is false." In the instant case, it appears from the allegations of the mandamus petition, and accompanying exhibits that the proper practice, as outlined in the Healy case, supra, was followed; that the documents as presented to the State's attorney were proper as to form as distinguished from their substance; and that on the day following their presentation the State's attorney returned them to petitioner's attorney, by letter, refusing to sign them, but not stating any reasons for such refusal.

It is next contended by counsel for petitioner that the documents presented to the State's attorney make out a good prima facie case for the institution of the quo warranto proceeding. Respondent contends to the contrary and this question is, in our opinion, the decisive one here involved. From the

holdings in the Healy case, supra, it is clear to us that, if said documents do make out a good prima facie case, the mandamus writ should have been awarded; it is equally clear to us that, if they do not, the action of the Superior court in dismissing the mandamus petition was proper, and that the judgment in question should be affirmed. Respondent contends in substance that the quo warranto petition presented to him did not make out a sufficient prima facie case to warrant the institution of the quo warranto proceedings, because (a) conclusions as distinguished from facts are stated in reference to the alleged irregularities and frauds; (b) it does not affirmatively appear that petitioner exhausted all his remedies within the corporation for a recount, - citing Engel v. Walsh, 258 Ill. 98, 103; and (c) it does appear affirmatively that, under the rules adopted by the corporation governing the election in question, the decision of the convention "is final," and that said convention, after hearing the protests of Hasu as to the result of the counting of the ballots, denied said protests and declared Wychlinski the duly elected president, as, under the constitution, by-laws and rules of the corporation, it had power and jurisdiction to do, - citing People v. Order of Foresters, 162 Ill. 78, 86; People v. Polish National Alliance, 210 Ill. App. 156, 157. After a careful consideration of the allegations of the quo warranto petition, together with those in the affidavits accompanying it, above outlined and commented upon, we have reached the conclusions that the contentions of respondent are well founded, that he, as State's attorney, did not abuse his discretion in refusing to institute the quo warranto proceedings, and that the Superior court did not err in sustaining the demurrer to the mandamus petition and dismissing it at petitioner's costs.

Accordingly, the judgment of the Superior Court is affirmed.

AFFIRMED.

Fitch, J., concurs.

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243 I.A. 620

GUS THOMAS,
Appellee,

vs.

EVENING AMERICAN PUBLISHING COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

Appellant seeks to reverse a judgment for $12,500 rendered against it after verdict in an action for damages for plaintiff's personal injuries received as the result of an automobile collision on the afternoon of May 24, 1924.

Originally there were three defendants: appellant, one Gust. Nelson and the Garage Service Company. The jury found Nelson not guilty, but found appellant guilty, assessing plaintiff's damages at $12,500. Before the trial the Garage Service Company was dismissed out of the case.

Appellant's auto-truck was being driven at a rapid rate of speed west on Belmont avenue, an east and west street, Chicago, and Nelson was driving his touring car north on Clifton avenue, a north and south street and intersecting Belmont avenue at right angles. The two automobiles collided in the intersection. At the northwest corner of the intersection there was a row of stores, facing east on Clifton avenue. Plaintiff, about 28 years of age, was standing upon the sidewalk with his back to the east looking into the vacant corner store through its glass front door. Immediately following the collision the touring car travelled northwesterly, over the curb and sidewalk, struck and knocked plaintiff down, broke the door and door-jambs,

24371.A. 820

and partially protruded into the store before coming to a stop. Both of plaintiff's legs were broken and he was otherwise injured. The car had to be lifted so as to extricate him. The evidence was conflicting as to the movements of appellant's truck immediately following the collision. There was testimony that it turned to the right, north and east on Clifton avenue, and came to a stop a few feet west of the east curb and a few feet north of Belmont avenue. And one witness testified that it was jammed against the touring car and so remained until some men pushed it away and turned it north. There was no testimony that the truck ran into or struck plaintiff.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant's (appellant's) attorney moved for a directed verdict upon the ground that there was a material variance between the allegations of plaintiff's declaration and the proof, in this, that, while the declaration charged that defendant's motor vehicle struck plaintiff, the proof showed that it did not, and that it did not get upon the sidewalk where plaintiff had been standing. The motions were denied and plaintiff did not attempt to make any amendments to his declaration, and the same was not amended before entry of the judgment. And defendant's motions for a new trial and in arrest of judgment were severally overruled.

Plaintiff's amended declaration consisted of four counts. During the trial he withdrew the fourth count. The first, after alleging the movements of the two vehicles in the intersection and the place where plaintiff was standing in the exercise of due care for his own safety, charged that the defendants so negligently controlled and managed their said motor vehicles at a high and dangerous rate of speed towards plaintiff that "said motor vehicles then and there ran into and struck with great force and

violence upon and against the plaintiff," thereby injuring him, etc. The second charged that the defendants so negligently drove and managed their motor vehicles as to run them in and upon the portion of Belmont avenue provided for pedestrians, and that by reason thereof "said motor vehicles then and there struck with great force and violence upon and against plaintiff," etc. The third, after setting out certain sections of the Motor Vehicle Law relating to the speed of vehicles, etc., alleged that the place of the collision was in a closely built up business portion of the city, and the defendants negligently, and in violation of said statutes, propelled and operated their motor vehicles at rates of speed in excess of 10 miles an hour, and charged that, as a proximate result of said negligence, their "said motor vehicles then and there ran into and struck with great force and violence the plaintiff," knocking him down, etc.

The main point, relied upon by defendant's counsel for a reversal of the judgment, is, that there was a material and fatal variance between the allegations of each of the three counts of the amended declaration and the evidence. We are of the opinion that the point is well taken and that the court erred in entering the judgment appealed from. The uncontradicted evidence shows that only Nelson's touring car ran into and struck plaintiff and that defendant's truck did not do so, as charged. In Wabash R. Co. v. Billings, 212 Ill. 37, it was alleged in the declaration that plaintiff's buggy was struck by defendant's train and he was then and there thrown out and injured, while the proof showed that he was not thrown from the buggy until the horse had run nearly a hundred feet from the crossing, and it was held that the variance was a fatal one, where it was specifically called to the attention of the trial court, and no amendment to the declaration was made.

The Court says (pp. 39-40):

> "It is a well known rule that allegations and proofs must correspond, both for the purpose of specifically advising the opposite party of what he is called upon to answer, and also of preserving a record of the cause of action as a protection against another suit based upon the same cause. A pleading is intended to disclose a cause of action or defense, and a party has a right to know what he is charged with, to enable him to properly make out his case and to prevent his being taken by surprise by the evidence at the trial. * * Every allegation which is descriptive of the cause of action must be proved as alleged in the pleading, and any variance therefrom is fatal unless it is waived by not calling it to the attention of the trial court or is cured by an amendment of the pleading. Even if there are unnecessary allegations descriptive of what is material they must be proved. * * It is argued that there was no error in the ruling because the striking of the buggy by the car was the proximate cause of the injury. But that is only saying that plaintiff proved a good cause of action, while the question was whether the tort described in the declaration was the one proved upon the trial." (See, also, Feder v. Midland Casualty Company, 316 Ill. 552, 559.)

Defendant's counsel also contend that other assigned errors require a reversal of the judgment (a) denial of a motion to withdraw a juror and continue the cause because of improper conduct of plaintiff's agent in communicating with a juror; (b) admitting certain improper testimony of plaintiff's medical witnesses; and (c) improper statements of plaintiff's attorney in his argument to the jury. We will not discuss these points, for, if there were any errors as contended, they are not likely to again arise.

For the reasons indicated the judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

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110 - 30928

243 I.A. 620

KELLY-IVERSON, INC., a corporation,
Appellee,

v.

THEODORE AARON, INC., a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit to recover damages for the breach of defendant's warranty as to the quality of certain eggs the jury returned a verdict against defendant, the seller, and assessed the damages of plaintiff, the purchaser, at $1314.71. On October 10, 1925, judgment was entered on the verdict and this appeal followed.

In plaintiff's declaration, which consisted of a special count and to which defendant pleaded the general issue, it is alleged in substance that the parties severally were engaged in business in Chicago, buying and selling poultry, butter, eggs, etc., as commission merchants; that on August 31, 1923, defendant represented to plaintiff that it had a carload of eggs, of 400 cases of 30 dozen each, that the eggs were "the Roy Winsler best grade storage eggs, weighing 57 pounds per case and known as Circle 'W' brand, and that the same were in first class condition;" that plaintiff purchased the eggs (at 32 cents per dozen) and paid defendant $3840 therefor; that the purchase was made in the regular course of business and "for re-sale;" that they were consigned to New York City and contracted to be sold there to other parties (at 33 cents per dozen) for $3,960; that

they were not in fact Ray Winsler eggs of Circle 'W' brand and were not of the weight of 57 pounds to the case, but on the contrary ranged in weight from 49½ pounds to 52 pounds per case and were irregular in size and color and were of an inferior grade, all of which facts and knowledge were in defendant's possession at the time it bargained and sold the eggs;" that the fair, cash market value of the eggs was $2630 (for which sum plaintiff was compelled to dispose of them), instead of $3960; and that by reason of the foregoing plaintiff was damaged in the sum of $1330, etc.

The negotiations for the sale of the eggs were had in Chicago between Lloyd I. Snyder, vice president of plaintiff, and Theodore Aaron, president of defendant, on August 31, 1923. The car containing them was then in transit to Chicago and they were sold to plaintiff, f.o.b. Chicago, for $3340, and Aaron, knowing that plaintiff had purchased them for resale in New York city, agreed to divert the car to that point. On August 31st defendant delivered its order to the carrier, re-consigning the car to plaintiff at New York and directing the issuance of a new bill of lading to plaintiff as consignee, and at the same time surrendered to the carrier the original bill of lading. In the re-consigning order defendant stated that it "will pay all charges on this car to Chicago," and that the "re-consigning and icing charges at Chicago" were "to follow with freight to New York." On the following day the carrier issued a new bill of lading, in exchange for the original so surrendered, and defendant delivered the same to plaintiff together with its invoice, showing that defendant had "sold to Kelly-Iverson" the eggs, "shipped to yourselves" as per attached bill of lading. Upon the receipt of these papers plaintiff, not having seen the eggs but relying upon the verbal warranty as stated in the declaration, paid defendant the

sum of $3340, and defendant's representative marked the invoice "paid." At this time plaintiff had already re-sold the eggs, f.o.b. Chicago, for $3960 (i. e., at 33 cents per dozen) to a New York firm, upon the basis that they were of the same quality and grade as warranted. And defendant, through Aaron, had knowledge of such re-sale. When the eggs arrived at New York they were inspected by an official inspector and by representatives of the New York firm and found not to be of the quality and grade as warranted, and they were rejected by said firm. Plaintiff's evidence further disclosed in substance that they were not the best grade of storage eggs, were not what was known as Circle 'W' brand, and did not weigh 57 pounds to the case, but much less, averaging not to exceed 50½ pounds, and that some were small, dirty, shrunken and "weak-bodied;" that defendant was duly notified that the eggs were not of the quality as warranted, and that plaintiff's purchaser had rejected them, and defendant was requested to direct disposition, which it refused to do; that plaintiff was compelled to sell them, and did so, at prices ranging from 25 cents to 26-1/4 cents per dozen, which were the fair, cash market values at the time of eggs of their quality and grade, aggregating the sum of $3066.37, from which there was deducted the freight charges to New York and cartage there, amounting to $421.08; and that plaintiff received the net sum of $2645.29. The verdict of the jury, $1314.71, is the amount for which plaintiff had sold the eggs to said New York firm, f.o.b. Chicago, $3960, less said net sum of $2645.29.

Defendant's counsel contend that the evidence is insufficient to sustain the verdict. This question is not open for our consideration because the bill of exceptions does not disclose that defendant made a motion for a new trial. (Daniels v. Shields,

38 Ill. 197, 198; Mason v. Letz, 73 Ill. 371, 374; Chicago, etc. R. Co. v. Haselwood, 194 Ill. 69, 76; Yarber v. Chicago & Alton R. Co., 235 Ill. 589, 597; Anderson v. Karstens, 297 Ill. 76, 79.) We have, however, reviewed the evidence and are of the opinion that it amply sustains the verdict as to defendant's liability on its express verbal warranty.

Counsel also contend that the trial court erred in not allowing defendant's motion for a peremptory instruction in its favor, because the evidence shows that Lloyd I. Snyder, personally, rather than plaintiff, purchased the eggs. While the bill of exceptions discloses that defendant at the close of plaintiff's evidence moved for such peremptory instruction and that it was denied, the bill does not show that, after defendant had introduced evidence in its behalf, the motion was renewed at the close of all the evidence. By failing to renew the motion, after having introduced evidence to contradict plaintiff's, defendant waived its right to assign as error the denial of the motion. (Joliet, etc. R. Co. v. Velie, 140 Ill. 59, 63; Harris v. Shebek, 151 Ill. 287, 293; Langan v. Enos Fire Escape Co., 233 Ill. 308, 312.) However, the evidence in our opinion clearly shows that the eggs were purchased by plaintiff, as the result of negotiations had between Snyder, its vice president, and Aaron, defendant's president. The written memorandum of sale, or invoice, signed by defendant, states on its face that the eggs were "sold to Kelly-Iverson."

Counsel also contend that, inasmuch as the depositions of three of plaintiff's witnesses, taken in New York and read to the jury and appearing in the bill of exceptions, do not bear the file mark of the clerk as having been filed in the cause, the

trial court erred in admitting the depositions in evidence. The contention is without merit. The depositions were taken upon oral interrogatories under a written stipulation that they "may be read upon the trial, subject only to objections as to competency, materiality and form" of the interrogatories and answers. The bill of exceptions does not disclose that defendant made any objections to the reading of the depositions to the jury, or to the competency, etc., of any of the interrogatories or answers. Defendant not having made any objection as to the depositions when read in the trial court cannot complain of them here for the first time.

Counsel further contend in substance that the verdict is excessive in that evidently an improper measure of damages was considered by the jury, and in that the freight charges on the eggs from Chicago to New York, and cartage charges in New York, improperly were included. This contention is also without merit. In Carpenter v. First National Bank, 119 Ill. 352, 360, where certain grain sold proved to be not of the quality bargained for, it is stated that the general rule as to the measure of damages is, "that the purchaser is entitled to recover the difference between the contract price and the value of the article in the market at the time and place of delivery." The Court cites with approval the case of Measmore v. N. Y. Shot and Lead Co., 40 N.Y. 422, 427. In that case it is said: "This rule, however, is changed when the vendor knows that the purchaser has an existing contract for a re-sale at an advanced price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the article to enable him to fulfill the same, because those profits which would accrue to the purchaser, upon fulfilling the contract of re-sale, may justly be said to have entered into the

contemplation of the parties in making the contract. * * This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of a contract, he shall, so far as money can do it, be placed in the same situation with respect to damages, as if the contract had been performed." In English v. Spokane Commission Co., 57 Fed. Rep. 451, plaintiffs, commission merchants at Omaha, Neb., sued defendant, engaged in the produce and commission business at Spokane Falls, Wash., for the purchase price of certain potatoes and cheese sold and delivered. Defendant set up a counterclaim for damages for breach of an express warranty on a carload of "strictly fresh" eggs, and also for breach of an implied warranty on the potatoes. Defendant recovered a judgment on its counterclaim. The U. S. Court of Appeals for the Ninth Circuit reversed the judgment because of the giving of an erroneous instruction relating to defendant's "loss of profits." (In the present case no instructions are properly before us, - they not being contained in the bill of exceptions.) In the course of its opinion the Court of Appeals said (p. 456): "As the sale was made at Omaha, and the goods were to be delivered at Spokane, the defendant was entitled to recover the difference between the contract price and the value of the goods in the market at Spokane at the time of the delivery." The Court quoted with approval certain statements made in 2 Schouler's Personal Property, sec. 585; viz: "The measure of damages recoverable for breach of warranty of quality is, in general, the difference in value between the article actually furnished and that which should have been furnished under the contract at the time and place agreed upon. * * Such reasonable expenses as the buyer has incurred in consequence of the

breach may be added in making up the estimate. * * The buyer may recover, not only for the direct and natural consequence of the seller's failure to perform according to agreement, but for such damages as both parties might reasonably be supposed to have foreseen, at the time of the contract, would flow from such breach." The court also cited with approval the Carpenter and Hexmers cases, supra, and also Thorne v. McVeagh, 75 Ill. 81. In said Thorne case suit was brought to recover damages for breach of warranty of the quality of certain hams shipped. They were sold in Chicago. The purchaser did not see them and the seller knew that they were bought for a customer in Salt Lake City of the purchaser. The seller shipped them for the purchaser to that point, - the latter paying the freight. They did not prove to be of the quality as represented and for that reason the purchaser lost the benefit of his re-sale. It was held in substance (p. 84) that the measure of damages was the difference between the price paid in Chicago and what they were worth when delivered, and also the freight on them from Chicago to Salt Lake City and the profits which might reasonably be expected on re-sale at the latter point, which were estimated at one cent per pound. In the present case plaintiff, relying upon defendant's warranty as to the quality of the eggs and not seeing them, purchased them of defendant, while they were in transit to Chicago, at 32 cents per dozen, f.o.b. Chicago, and paid defendant therefor the sum of $3840. At the time of the purchase defendant, knowing that the eggs had been purchased for re-sale to plaintiff's customer at New York City at an advanced price, f.o.b. Chicago, agreed to divert the shipment to that point and did so. Plaintiff had re-sold the eggs to its New York customer upon the basis that they were of the quality as defendant had warranted, at an advance of one cent per dozen (33 cents per dozen) or for the sum of $3960, f.o.b. Chicago.

If the eggs had been as warranted plaintiff would have received from its customer said sum of $3960. But because of their not being as warranted and being of an inferior quality, the customer rejected them, after arrival and inspection at New York City, as he had a right to do, and plaintiff was compelled to sell them at the market prices at New York city then prevailing for eggs of such inferior quality, and did so, after notifying defendant, and received therefor the net sum, less freight from Chicago to New York and cartage in New York, of $2645.29. Under the circumstances and the authorities above cited, we think that the jury's verdict, and the judgment entered thereon, against defendant, $1314.71, (being the difference between the sum for which plaintiff had sold the eggs to its New York customer and what it actually received) is the proper measure of plaintiff's damages. It was entitled, "so far as money can do it, to be placed in the same situation * * as if the contract had been performed." The eggs having been refused by its New York customer, and it being the consignee thereof, plaintiff was liable for the freight and cartage, which it would not have been obliged to pay had the eggs been as warranted. We regard this expense as being properly chargeable against defendant. It was "incurred in consequence of the breach," and was a damage to plaintiff flowing therefrom and which defendant might reasonably have foreseen. And we are also of the opinion that plaintiff's evidence sufficiently shows that the sales of the eggs in New York were made at the fair cash market prices then and there prevailing for eggs of their actual quality and grade. In view of the diverting of the shipment at the time of plaintiff's purchase the place of the delivery of the eggs was New York city, and the market price there should govern.

(Newlan v. Dunham, 60 Ill. 233, 236; English v. Spokane Commission Co., supra.)

Counsel also complain of certain rulings of the trial court on the admission and rejection of testimony, and of certain statements made by plaintiff's attorney during the trial in the presence of the jury. We have considered the rulings and the statements, and are of the opinion that they were not prejudicial to defendant and were not such, even if erroneous, as require a reversal of the judgment.

For the reasons indicated the judgment of the Circuit court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

219 - 21038

ALICE M. WIGNEY,
Appellant,

vs.

CHARLES H. COYLE,
Appellee.

243 I.A. 620

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

On November 7, 1925, in an action on the case, the Superior court sustained a demurrer to plaintiff's third amended declaration, consisting of two counts, and, upon her election to stand by the declaration, entered judgment for costs against her. This appeal followed. It is contended that the court should have overruled the demurrer. As counsel's argument is limited to the first count of the declaration, we will not discuss the second.

It is alleged in the first count that plaintiff, before and at the time of the committing of the grievances complained of, was a person of good repute, etc., and never had suffered from insanity or other mental derangement; that on September 8, 1920, at Chicago, defendant, well knowing the premises and maliciously intending to injure her and bring her into public disgrace and have her incarcerated, appeared, "without any notice to plaintiff," before the clerk of the County court of said county, and without any reasonable or probable cause therefor, "falsely and maliciously signed, swore to, and filed a petition" for the appointment of a commission to try the question of her sanity; that in the petition defendant "falsely and maliciously stated" that plaintiff was insane, that her welfare and that of others required her commitment to some hospital or asylum, that her condition was such as to render a trial by jury inexpedient, and that it was manifestly improper for her to be brought before the court for a hearing, etc.; that the statements in the petition were false and known to

defendant to be such; that on the same day defendant "wilfully and maliciously procured and caused" the then presiding judge of the County court "to appoint a commission" to examine plaintiff's physical and mental condition, viz., two physicians (naming them); that defendant by false and malicious statements, caused these commissioners "without an interview or an examination either physical or mental and without either of them ever having seen plaintiff," or without either ever having any knowledge as to her condition, "to make a report and finding" that the plaintiff was insane, etc.; that thereupon defendant "maliciously and wrongfully caused" the judge of said court, upon said false report only, "and without any notice whatever either verbal or written and without the presence of the plaintiff" before the court, to hold an inquest of lunacy; that at the hearing "she was not represented in person," or by guardian ad litem, nor did she have any notice thereof, nor was she permitted to have a voice therein; that defendant then and there "maliciously and falsely testified that plaintiff was insane" and that it was unsafe for her to be at large; that as a result of the hearing, and on the same day, she was ordered committed to the Elgin Hospital for the Insane; that by means of the commitment order defendant caused the clerk of said court to issue to him (defendant) a warrant directing him to apprehend plaintiff and deliver her to the hospital; that on the same day defendant, maliciously and fraudulently, procured her to accompany him to the hospital by falsely representing to her that she was being conveyed on a visit to friends at Berwyn, Illinois; that she was detained as a prisoner in the hospital or asylum, and there remained until October 20, 1930, during all of which time she suffered great anguish of mind and humiliation, etc.; and that by reason of the premises she has suffered great damage in her good name and reputation, and in the loss of wages, and has since been unable to procure

or retain employment, etc.

It is further alleged in the count that on June 12, 1922, an order was entered by said County court "restoring plaintiff to the status of a sane person;" and that all of the above mentioned proceedings in the County court, so procured by the false and malicious acts of defendant, "are void and of no effect for want of jurisdiction over the person of the plaintiff."

After carefully considering the allegations of said count we are of the opinion that the Superior court did not err in sustaining defendant's demurrer thereto, and, plaintiff electing to stand by her declaration, in entering the judgment appealed from. It will be noticed that the count does not allege that the order of the County court, adjudging her insane and entered on September 8, 1920, has ever been vacated or reversed. The allegation, that subsequently, on June 12, 1922, the County court entered an order "restoring plaintiff to the status of a sane person," is not equivalent to an allegation that the original proceeding, alleged to have been instigated by defendant, terminated in plaintiff's favor, or that the court's order adjudging her insane and committing her to the asylum was subsequently reversed. As said by this appellate court in Hecker v. Welti, 230 Ill. App. 392, 395: "Both findings are authorized by statute, but the second may only be entered subsequent to the discharge of a patient from the asylum, and upon evidence which satisfies the court 'of his recovery,' i. e., that since the first order was entered, the patient has recovered the use of his normal mental faculties. (Cahill's Stat. 1925, Ch. 85, Sec. 25). While the second order 'restores the patient to all his rights as a citizen,' it does not adjudge that the first order was improperly entered." And it will further be noticed that plaintiff does not allege that it is shown by the record of the County court, when said order of September 8th was entered, that

plaintiff had no notice of the proceedings, was not present when the order was entered, or that the court did not have jurisdiction of her person. In this collateral proceeding she merely asserts, without stating what the record of the County court shows, that she had no notice of said proceedings and was not present when said order was entered. While the County court is a court of limited jurisdiction it is not one of inferior jurisdiction. It is invested by the Legislature with jurisdiction in insane cases, etc., and as liberal intendments will be made in favor of its jurisdiction in this class of cases as will be extended to proceedings in the Circuit court. (Moats v. Moore, 199 Ill. App. 270, 274; Fecht v. Freeman, 251 Ill. 84, 97). And it will be presumed that the County court, when it entered said order of September 8th, had jurisdiction both of the subject matter and the person of plaintiff. (Moats v. Moore, supra.) Furthermore, the record imports verity and cannot be impeached by parol testimony. (Moats v. Moore, supra; Bishop v. Welch, 149 Ill. App. 491, 497). In the case last cited, quoting from West Chicago Street R. Co. v. Morrison, etc. Co., 160 Ill. 288, 290, it is said: "When the record is once made up it is conclusive upon all parties until altered or set aside by a court of competent jurisdiction, and all questions relating to the time when it was in fact made, or in regard to the authority on which it was made, or in respect to the truthfulness of its recitals, must be settled by reference to the record alone. But if an order is improperly entered, or does not state the facts as they actually occurred, application may be made to the court in which the record is, to correct its record." In Dedrick v. Durham, 136 Wash. 265, 268, it is decided that an adjudication of insanity, by a court of general jurisdiction, cannot be collaterally attacked in an action

for conspiracy to institute a malicious prosecution. In the opinion it is said: "The court which adjudged the appellant to be insane was one of general jurisdiction, and if it did not have jurisdiction of the person of the plaintiff, that was an error which could only be corrected in that court or on appeal." In Shultz v. Shultz, 136 Ind. 333, plaintiff charged in her complaint that a judgment setting aside a conveyance from her husband to herself, as in fraud of the husband's creditors, was obtained by a conspiracy between the husband and the creditors to defraud her out of her property, and she asked damages. The trial court sustained a demurrer to the complaint and, she declining to amend it, entered judgment against her. In affirming the judgment the court said (p. 336), "Until that judgment is out of the way, the appellant cannot recover another judgment which operates as an impeachment of the first judgment. If the judgment by which appellant's deed was set aside was fraudulently obtained, and the complaint had stated facts sufficient to establish that charge, yet so long as the judgment stands, there could be no recovery of damages for so obtaining it, because, so long as it stands, it imports absolute verity as to every proposition of law and fact essential to its existence against all the parties to it."

Furthermore, if the count in question be not considered as one charging a malicious prosecution, but as stating a cause of action for damages resulting from defendant's alleged acts of perjury and subornation of perjury, thereby causing the insanity finding and judgment to be entered against plaintiff, we think that it is still demurrable, because under decisions in this State and in other jurisdictions, such an action is not maintainable. (Hocker v. Welti, 230 Ill. App. 392, 397, and cases

cited: Ruehl Bros. Brewing Co. v. Atlas Brewing Co., 187 Ill. App. 392, 398; Keithley v. Stevens, 142 Ill. App. 406, 408; affirmed 238 Ill. 199, 202).

For the reasons indicated the judgment of the Superior court is affirmed.

AFFIRMED.

Barnes and Fitch, JJ., concur.

266 - 31086

243 I.A. 620

FORT DEARBORN LUMBER CO., a corporation,
Appellee,

v.

COMMUNITY STATE BANK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant bank seeks to reverse a judgment for $3456.05, rendered against it on January 16, 1926, after verdict, in an action in assumpsit.

In the statement of claim, filed February 1, 1924, it is alleged in substance that on November 28, 1923, plaintiff, a depositor in defendant bank, delivered to it a certain check drawn on another bank (Home Bank & Trust Co.) for $8,000, payable to plaintiff's order and by it endorsed, with instructions that the proceeds of the check, when collected, be credited to plaintiff's account in the defendant bank; that plaintiff then was indebted to defendant in the sum of $3,000, plus accrued interest, on its two notes, dated May 28, 1923, - one for $1,000, due August 26, 1923, and one for $2,000, due September 26, 1923; that defendant collected the amount of the check and properly charged plaintiff with $3,040.83, being the amount due defendant on the two notes, and plaintiff was entitled to be credited with the difference, $4959.17; that defendant, however, refused to credit plaintiff's account with all of said difference, but only allowed a credit of $1923.98, and withheld and still withholds from plaintiff $3035.19; and that plaintiff's claim is for this amount so withheld, together with interest.

24?1.A. 620

In defendant's amended affidavit of merits, made by its president, Max Shulman, it stated that on November 28, 1923, plaintiff was indebted to it in the amount of the two notes, but denied that, when said $8,000 check was delivered to it, plaintiff instructed it to credit the proceeds, less the amount due on the two notes only, to plaintiff's deposit account. It alleged in substance that on said day one Charles S. Smith, president of plaintiff, also had on account with defendant bank, and was indebted to it in the sum of $5950, being a balance then due for loans theretofore made by defendant to him; that more than a year before plaintiff and Smith had delivered to defendant 12 of plaintiff's notes for $1,000 each, payable monthly, and totaling $12,000; that afterwards they took up 3 of these notes, and thereafter from time to time pledged as security for the other notes sundry other collateral; that, as collateral for the original 12 notes of plaintiff they had pledged and delivered to defendant a note for $12,000 of the Chicago Title & Trust Co., trustee, secured by its deed of trust to another Chicago bank, as trustee; that on November 28, 1923, plaintiff and Smith, being desirous of taking up said note of the Title & Trust Co., trustee, agreed to and did pay to defendant the amount of Smith's indebtedness to it, by tendering and delivering to defendant the $8,000 check, and defendant, at the time and in pursuance of the agreement, surrendered the note of the Title & Trust Co., trustee, as well as all other collateral then held by it as security for all of Smith's and plaintiff's indebtedness to it, and received said check in payment of all their indebtedness to it; that the $8,000 check, so tendered and accepted, represented personal funds of Smith, and defendant, upon its receipt, surrendered and delivered up, as requested by plaintiff and Smith,

all notes of Smith, evidencing his said indebtedness of $5950; that after the payment of Smith's and plaintiff's indebtedness to defendant, there remained out of said $8,000 check $1,923.98, which sum defendant, at the request of plaintiff and Smith, credited to plaintiff's deposit account, and said sum since was withdrawn by plaintiff's checks, honored by defendant; and that defendant is not indebted to plaintiff in any sum.

The evidence disclosed the following facts in substance; Charles S. Smith was in control of the plaintiff corporation. He was its president and managed its business, but was engaged in other business affairs. He had an assistant, Herbert J. Smith, his brother or brother-in-law, who was treasurer of plaintiff and also acted as its bookkeeper and stenographer. As early as December, 1921, Charles S. Smith (hereinafter referred to as Smith) had a personal account with the defendant bank (hereinafter referred to as the bank) of which Max Shulman was president and Jacob Sidwitz a vice president. The plaintiff corporation also had an account with the bank. Smith's account was the more active of the two, and he was a somewhat frequent borrower from the bank, usually an indirect borrower, i. e., one who endorses and discounts notes of others instead of borrowing on his own note. About July 27, 1922, plaintiff issued to Smith, on account of an indebtedness he claimed it owed him, its 12 notes for $1,000 each, payable monthly to his order. Smith endorsed these notes and took them to the bank, saw Sidwitz and told him that he, personally, wanted to borrow $12,000 on the notes by discounting them at the bank. He afterwards delivered, as collateral security for the loan the $12,000 note (mentioned in defendant's affidavit of merits) of the Chicago Title & Trust Co., trustee, secured by a junior trust deed upon certain improved real estate. This note was Smith's

property, and the title to the real estate had been in him, but for some reason he had conveyed it to the Title & Trust Co., trustee, to hold in trust for him, under a trust agreement dated April 1, 1912, which provided inter alia that the trustee would act only upon Smith's written orders and that he should have the management and control of the real estate and determine as to renting, sale, etc. About the middle of July, 1922, Smith had given his written order to the Title & Trust Co., trustee, to execute the $12,000 note and trust deed and deliver them to him; and the instruments, dated July 20, 1922, were executed during the progress of the negotiations with the bank. Shulman finally passed favorably upon the loan, and it was consummated, about August 11, 1922, and plaintiff's 12 notes of $1,000 each and said $12,000 note and trust deed subsequently came into the bank's possession. At the time the $12,000 loan was negotiated Smith was indebted to the bank in about $5,000 on certain matured loans, previously made to him, and it was agreed between him and Shulman, representing the bank, that the amount of the indebtedness was to be deducted from the $12,000, and the balance thereof credited to his personal account at the bank. This was done and nearly all of said balance, so credited, was subsequently checked out by him.

The 12 notes of plaintiff, maturing monthly, were not all promptly paid, and in some instances other collateral was deposited by Smith or plaintiff, and in other instances new renewal notes were executed by plaintiff to take the place of those which had matured. The two notes of plaintiff, mentioned in its statement of claim as being properly chargeable against the proceeds of said $8,000 check, are two of said renewal notes. Some time in November, 1922, Smith arranged with Shulman to borrow of the bank an additional $3,050 on his own note for that amount. On January 4, 1923, this note had matured and was unpaid, and one of plaintiff's original

$1,000 notes also had matured and was unpaid, and Shulman wrote Smith to call and arrange for their payment. Smith called and apparently arrangements were made for an extension. On April 4, 1923, Smith wrote Shulman in part as follows: "I will lend the Fort Dearborn (meaning plaintiff) enough to pay all their past due notes, $3,000, and then they will be in shape to pay the balance as due. I am negotiating a deal for a loan of $15,000 on a second to be secured by a new mortgage to replace the one you hold for guarantee on the Fort Dearborn notes; if I conclude this, I will then pay you all up, including mine."

About this time Smith had in his possession a note, called the "Sloan note." This was a collateral note for $3,000, dated October 13, 1922, signed by H. H. Sloan, and payable to Smith's order on July 1, 1923. It appears from its face that Sloan had deposited with Smith, as collateral, 30 shares of stock in a motor company, and the legal holder of the note was given authority at maturity, if the note was not paid, to sell that stock. Smith, being hard pressed to meet his obligations at the bank, several times requested Shulman that he be allowed to substitute this Sloan note for his own unpaid note of $3,000. Shulman testified that Smith represented to him that Sloan was fully responsible for his note and that, moreover, it was secured by the stock collateral and further stated that "in addition to all this you have the $12,000 collateral note" of the Title & Trust Co., trustee, and that "I am negotiating for a big loan on it and as soon as I succeed in making definite arrangements I will take up this collateral and pay everything I owe you." Finally, about June 13, 1923, shortly before the maturity of the Sloan note, Shulman, for the bank, agreed to the substitution, and Smith indorsed the Sloan note and delivered it to the bank, depositing therewith the stock collateral, and his

said note for $3,050 was returned to him. At this time Sloan was notified, as requested by Smith, that his note was at the bank, but it was not paid at maturity, and Smith requested that the same be turned over to the bank's attorney for the purpose of starting immediate action against Sloan. On September 5, 1923, plaintiff, by letter dictated by "H.J.S." (Herbert J. Smith), wrote the bank's attorney: "Referring to the Sloan matter we have a letter from Mr. Chas. S. Smith asking us to have you write him just how the matter stands. He also asks that you fix the records so it shows that Mr. Smith bought that stock that morning for $50. Then send Mr. Smith the certificate, and he states that he will have William E. Rafferty (Smith's attorney) * * start an action independent of you on the stock side of the deal."

The evidence further shows in substance that shortly prior to November 28, 1923, while the bank was still holding said $12,000 note and trust deed as collateral security for all of plaintiff's indebtedness to it, and as it claims as security also for all of Smith's indebtedness to it (including that represented by the Sloan note), Smith and his wife, Olive I. Smith, had made arrangements through the Home Mortgage & Investment Co., and the Home Bank & Trust Co., to take out a new loan on the real estate described in said trust deed. In order to get this new loan it was necessary to take up at defendant bank said $12,000 note and trust deed, and procure the release of record of the trust deed. And Smith and wife arranged to have the Home Mortgage & Investment Co. issue its check for $8,000, dated November 28, 1923, payable to plaintiff's order and drawn on the Home Bank & Trust Co. And on that day Smith's wife signed and delivered to the Home bank her written order that "upon delivery to you (Home bank) of the $12,000

second mortgage on property, Ogden & Harlem Aves., you will please pay to the Fort Dearborn Lumber Co. (plaintiff) $8,000." On the same day plaintiff, by Herbert J. Smith, endorsed the $8,000 check in blank and delivered it to one of the officials (Sidwitz) of defendant bank, and he in turn surrendered said $12,000 note and trust deed, and said note and trust deed came into the possession of the Home bank. The $8,000 check was thereafter paid through the Chicago Clearing House and defendant bank, out of the proceeds, paid the then existing indebtednesses of both plaintiff and Smith to it, and credited on plaintiff's deposit account the balance remaining, $1,923.98, which, with the exception of a small sum, was thereafter drawn out by plaintiff's checks.

The main question of fact, in controversy at the trial, was in substance whether, on or prior to November 28, 1923, it was agreed between defendant bank and plaintiff and Smith that, upon the bank's surrender of said collateral (the $12,000 note and trust deed) and the receipt by it of the $8,000 check, the bank should deduct from the proceeds of the check, not only the then existing indebtedness of plaintiff to it (as evidenced by plaintiff's two notes as set forth in its statement of claim) but also all the then existing indebtedness of Smith to it, including that as evidenced by the Sloan note, which Smith had endorsed and which was then long overdue and unpaid. Plaintiff contended on the trial and here contends that the bank agreed to give up this collateral (which Smith had to have in order to get his new loan at the Home bank) upon plaintiff's agreement that, out of the proceeds of the $8,000 check, the bank might only pay to itself the amount due on plaintiff's said two notes. The bank contended on the trial and here contends that the agreement and understanding

was that out of said proceeds, in consideration of the surrender of said collateral, there should also be deducted all of Smith's then existing indebtedness, including that evidenced by the Sloan note. From the jury's verdict it is apparent that they decided this main question in plaintiff's favor.

The main contention of the bank's counsel is that the verdict is contrary to the clear preponderance of the evidence. After carefully reviewing this voluminous record, and the testimony, documents, letters, etc., therein contained, we are of the opinion that the contention is well founded and that there should be a new trial of the case. Shulman further testified in substance that, when Smith called upon him to arrange for the original loan of $12,000, on plaintiff's 12, $1,000, notes (to be secured by said $12,000 note and trust deed) Smith informed him that he was practically the owner of the plaintiff company and that he operated it as a corporation because he had other business interests; that several weeks prior to November 28, 1923, Shulman had a conversation with Smith in which he said that unless Smith paid up all outstanding loans the bank would take action as to said collateral; that Smith answered that Shulman should not worry as the Home bank had finally agreed to make a new loa and, as soon as a title question was cleared up, "the $12,000 note will be taken up, and <u>everything I owe at the bank will be paid</u>;" and that Shulman replied that he would postpone his contemplated action for a short time. Herbert J. Smith testified that he was present at the Home bank with Gidwitz, vice president of defendant bank, on November 28, 1923, when he delivered the $8,000 check to Gidwitz and when Gidwitz delivered to the Home bank the $12,000 note and trust deed; that he asked Gidwitz to deposit said check in defendant bank, "for the credit of" plaintiff, and to "charge up <u>our</u> notes against <u>our</u> account;" and that at that time plaintiff

owed defendant bank only $3,043.83 on its two notes, as mentioned in its statement of claim. Gidwitz, no longer connected with the bank at the time of the trial, testified in substance that about a week or two prior to November 28th, he informed Smith, at plaintiff's office in the presence of Herbert J. Smith, that matters had reached such a point at the bank that plaintiff's indebtedness and Smith's indebtedness to the bank, aggregating about $5,950, must all shortly be paid, that Smith replied that he was making arrangements to do so by getting a new loan through the Home bank which soon would be consummated, and that Smith explained the status of the negotiations therefor; that early in the morning of November 28th he again saw Smith and Herbert J. Smith at plaintiff's office, that Smith said to Herbert J. that he should go with Gidwitz to the Home Bank and get an $8,000 check there, and endorse it over to Gidwitz, so as to pay defendant bank "all the money that I owe;" that Gidwitz went back to defendant bank and got the collateral (the $12,000 note and trust deed), and later in the morning met Herbert J. Smith at the Home bank, where he surrendered to that bank said collateral and received from Herbert J. Smith at the time the $8,000 check endorsed in blank by him; and that at the time of said transfer Herbert J. Smith said to Gidwitz: "Go ahead, and pay the notes we owe and credit the balance to our account; * * pay all that is owed, $5,950." Smith denied on the stand that he ever told either Shulman or Gidwitz, or agreed with either of them, that when the $8,000 check was received by the bank, all of his and plaintiff's indebtedness to the bank might be paid out of the proceeds of said check. He, however, testified that during one of the conversations he had with Shulman, as to the $loan note and as to the probable subsequent release by the bank of the $12,000 note and trust deed, Shulman said to him: "We are

going to hang onto the collateral until we get it all." And the transaction of November 28th, as well as the facts and circumstances in evidence leading up to it, together with certain of Smith's prior letters to the bank, all strongly tend to corroborate the testimony of Shulman and Sidwitz, viz, that said $12,000 note and trust deed, held as collateral by the bank, was only surrendered coincident with the receipt by it of said $8,000 check, and under the express verbal understanding and agreement, between plaintiff, Smith and the bank, that out of the proceeds of said check, before making any credit to plaintiff therefor there should first be deducted all the then existing indebtedess of both plaintiff and Smith to the bank, including that portion of Smith's indebtedness as evidenced by the Sloan note. And we do not think that there is any merit in the contention of plaintiff's counsel that the bank bought the Sloan note from Smith and thereby, to the extent of the face of the Sloan note, released Smith from his indebtedness to the bank. The Sloan note was endorsed by Smith and the facts and circumstances in evidence tend to show that the Sloan note, together with the motor company stock mentioned in the note, were held merely as collateral security to so much of Smith's indebtedness to the bank as was represented by the face of the note. And we do not think that the fact that the bank, after November 28, 1923, did not return to Smith the Sloan note, marked cancelled and paid, tends to sustain said contention of plaintiff's counsel. Smith did not want the Sloan note returned to him, marked cancelled and paid. He, as the endorser of the note to the bank, wanted the bank, after Sloan had failed to pay it, to sue the maker and obtain judgment against him, and he requested the bank to give it to the bank's attorney for that purpose, and the bank complied with this request.

Another ground, urged by counsel for the bank for a

reversal of the judgment, is, that the court erred in admitting in evidence, over objections, certain letters, offered by plaintiff, and written by it to the bank after the consummation of the transaction of November 28, 1923. It is contended that the letters contain self-serving declarations in plaintiff's behalf and that their admission constituted prejudicial error. Under date of December 10, 1923, plaintiff, by H. J. Smith, Treas., writes the bank: "November 28th, we deposited for our account $8,000, November 30th, you sent us a credit memo for $1923.99, charging our account with items purporting to reduce our credit of $8,000 to this amount." After stating that plaintiff had twice before in December written for information regarding said charges and had received "no reply," and after further stating that "your negligence" might be attributed to "confusion in your moving," the letter concludes: "We must have this information. This letter to you by registered mail, sort of reciprocating for the many registered communications you have favored us with in the past." On December 18, 1923, plaintiff, by H. J. Smith, wrote the bank: "We have yours of the 17th, showing debits and credits you have made in our account. There is nothing we understand clearly except that we deposited $8,000 for our account. Please advise the dates and due dates of the notes or note that you refer to as 'your loan.' Also, we have no record of $50 paid on July 31st." On December 26, 1923, plaintiff, by its treasurer, wrote the bank: "Your letter of the 21st; the only cancelled notes you returned to us are: $1,000 due Aug 26, 1923, and $2,000 due Sept. 26th, 1923. On your statement you show an item of interest on $3,000 for 148 days, $36.33; just above that you show two items of interest on $3,000. It appears to us that you have charged us twice with principal and interest on the amount of $3,000." On January 14, 1924, plaintiff, by

said H. J. Smith, wrote the bank: "Yours of the 11th. * * There is no need of our coming way out to your bank. You have charged our account, per yours of December 17th, $5,950. Up to this time, all we have been able to get from you to show for this charge are our two notes. * * How do you charge us up with the balance of $5,950? In each letter we have asked for this specific information. Now, give it to us, and deliver us any further cancelled notes that might make up the difference. If any one goes out to your bank it will be my brother, and you'll have to put an asbestos seat on." To this letter Shulman, as president of the bank, replied on the following day by letter (introduced by plaintiff): "We wish to state that the $2,950 was the Sloan note, on which $50 was realized, and which was discounted by your Mr. Charles Smith. This $2,950, together with the $3,000 of the Fort Dearborn notes, represents the $5,950 charged to your account." We regard plaintiff's said letters to the bank as self-serving declarations and evidently written in contemplation of the institution of the present suit, which was commenced on February 1, 1924, and we think that the court erred in allowing them in evidence, over the bank's objections that they were self-serving and therefore inadmissible. (Howard v. Anderson, 162 Ill. App. 256, 259; Jewell Belting Co. v. Hamilton Rubber Mfg. Co., 257 Ill. 238, 242.)

Counsel for the bank also contend that the court erred in giving certain instructions, and in refusing one offered by the bank. We have read these instructions but, inasmuch as the judgment must be reversed and the cause remanded for another trial, we deem it unnecessary to discuss them. If there were errors in the particulars as urged, these errors are not likely to occur again.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

278 - 31098

243 I.A. 220

HELEN TENNEY,
Appellee,

v.

MARTHA MINEHAN DINSE,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit, commenced May 29, 1923, against plaintiff's step-mother, for money had and received, the jury returned a verdict assessing plaintiff's damages at $2,000, and on October 23, 1925, the court entered judgment upon the verdict against defendant and she appealed.

Plaintiff's declaration consisted of the common counts, accompanied with affidavit that the sum of $2376 was due and owing. Plaintiff also filed, after rule entered, an itemized bill of particulars in which she stated that her claim was for $3224, for "moneys deposited" by her with defendant for 8 weeks during July and August, 1917, in the amount of $14 per week, and also for various other amounts so deposited weekly, commencing February 1, 1919, during the years 1919, 1920, 1921 and ending February 28, 1922. Defendant filed a plea of the general issue, and also an affidavit in which she stated that she was not indebted to plaintiff in any amount, that plaintiff had never deposited with her any of the moneys as set forth in the bill of particulars, and that defendant had never received from other persons any moneys for plaintiff's use and benefit.

At the trial plaintiff, whose maiden name was Helen Dinse, testified in her own behalf and she called her brother,

941 L C30

Edward, then about 22 years of age, as a witness for her. Defendant's testimony flatly contradicted that of plaintiff on all material points, and her testimony was corroborated in some particulars by certain writings and records identified and introduced. Plaintiff's father, Reinhold Dinse, did not testify. He and defendant were married in 1916, and thereafter and until early in March, 1922, when plaintiff married, the Dinse family continued to live together in their Chicago home. Plaintiff, after she finished high school and had reached the age of 18 years, worked for about two months during July and August, 1918, in a Chicago dry goods store, receiving as wages $10 per week, payable every two weeks. She commenced working again for wages at a Chicago mail order house in February, 1919, and continued to work there, practically without interruption, until about February 28, 1922, just before her marriage. She received at the start $14 per week, payable bi-weekly, and from time to time her wages were raised until she received $24 per week, which wages were lowered, about February, 1921, to $21 per week. She testified that she deposited all of her wages, as received in currency, with defendant, less "about two or three dollars a week for lunch and carfare." She was unable to state any definite amount of money deposited at any one time or the aggregate sum. And on cross-examination she stated: "I never asked Mrs. Dinse to pay me back this money at any time prior to May, 1923. I was married in 1922. * * I did not ask Mrs. Dinse for any money at the time I got married. I did my father. I asked him repeatedly to give me the money that was coming to me - all the money that belonged to me. I did not say how much." Her testimony further discloses that her marriage was opposed by her father and defendant.

She testified: "My father contributed nothing toward my wedding expenses. I was married at church, not at home * * I wasn't allowed to go to the house afterwards. She (defendant) told me never to darken the door again, also my husband. * * My father was present when she said that, and he didn't have anything to say. * * I had a chance to demand my money of her when she told me this, but I didn't demand it." Defendant testified: "I never told her that she had to turn her wages over to me. She never did so. * * She paid $5 a week board and during the last weeks $7. That money was paid to her father and never once paid to me." The evidence also showed that at one time when plaintiff was receiving wages defendant purchased for $200 a fur coat for plaintiff, under a verbal agreement that she (plaintiff) would pay back the amount in small installments out of her wages as received, and that she did so from time to time, making payments which aggregated $170. The balance of $30 was never paid back to defendant. The evidence also showed that out of her wages plaintiff made contributions from time to time towards the unpaid purchase price of an automobile used by all the family, which contributions always were paid to plaintiff's father. It was not shown what these contributions aggregated, but on the trial plaintiff's attorney stated that they, as well as the $200 item for the fur coat, should be deducted from the amount claimed of defendant.

The main contention of defendant's counsel is that the judgment should be reversed, because the jury's verdict is against the weight of the evidence, is capricious and arbitrary and superinduced by prejudice against defendant as step-mother, and

its amount ($2,000) is unwarranted under any legitimate interpretation of the evidence. After carefully reviewing the evidence we are of the opinion that the points are well taken and that there should be a new trial of the cause. (Conrad Seipp Brewing Co. v. Peck, 85 Ill. App. 637, 639; Cicero, etc. Ry. Co. v. Hughes, 185 id. 186, 193.) The evidence as to defendant's liability to plaintiff in any sum is most uncertain and unsatisfactory. Yet, even assuming that plaintiff did deposit with defendant from time to time certain sums received as wages, which in equity and good conscience ought to be returned to her, it is impossible to determine what the aggregate amount is. It is apparent, we think, that the verdict is excessive, and that there is no evidence upon which any remittitur may properly be based. Accordingly, the judgment of the circuit court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

32 - 30831

243 I.A. 621

PEOPLE OF THE STATE OF ILLINOIS, ex rel. MARK B. O'LEARY,
Defendant in Error,

v.

CHARLES V. CATINO, ROBERT BRAGLIA, LOUIS LAVERRATO, JOSEPH MOZELLE and MICHAEL JERONE,
Plaintiffs in Error.

ERROR TO
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error Catino, Braglia and Laverrato were judges of election, and Mozelle and Jerone clerks of election February 3, 1925, at a general registration in the 27th precinct of the 32d ward of Chicago. By this writ they seek reversal of the order of the County court holding them guilty of contempt in registering the names of four persons as residing at 2619 West Superior street, Chicago.

The proceeding was had under section 13, Art. II, City Election Act of 1885. The provision providing for such a proceeding has been declared by our Supreme Court to be valid. (People v. Hoffman, 322 Ill. 174; Sherman v. People, 210 Ill. 552.) The only point urged for reversal of the order we need consider is whether the charge of which they were found guilty was proven. Evidence adduced was to the effect that the four persons so registered did not reside at 2619 West Superior street; that two of them never resided there, and the other two had not resided there for three years. There was no evidence whatever tending to show that said officials knew such persons or that the persons who appeared, if any, to register in their name were not

the persons they claimed to be, or that such registrations were made without any one appearing and claiming a residence at such place. Each of the plaintiffs in error filed an affidavit under oath expressly and specifically denying the charges made against him. While in our judgment, as held in our opinion filed this day in No. 30830, People v. Sylvester, they were not purged of contempt by their answers their sworn denials should not be disregarded, especially in the face of the character of the proof offered to establish their guilt.

It cannot be presumed that the judges and clerks of election in any precinct know all of the persons who appear for registration or know their correct residences. If they do not know persons seeking registration who are not challenged they cannot justly be charged, in the absence of any other relevant fact, with unlawfully permitting them to register. The statute provides a check against unlawful registration by requiring the clerks of election to canvass the precinct to ascertain whether any persons are unlawfully registered (Cahill's Stat. 1925, ch. 46, par. 286), and points out the procedure for removal of improper names from the register. There was no proof that the prescribed steps were taken that might have brought home to respondents knowledge of said unlawful registration. Without proof in some form to show guilty knowledge of the unlawful registration the evidence must be deemed insufficient to support the charge of which they were found guilty.

At a prior investigation before the rule was entered plaintiff in error Braglia made an affidavit charging "the board" with permitting "against his protest" such unlawful registration. In his answer to the rule he specifically denied under oath that he was guilty in any respect of the charges on which the rule

was based. His conviction rests entirely on said affidavit, which was received in evidence against him on the theory that it was an admission of guilt on his part as he was a member of the "board" it referred to. But it is manifest that if whatever "the board" or election officials of that precinct did that was irregular or unlawful was done against his protest he could not be deemd as assenting to or participating therein. The proof, therefore, is as deficient with respect to him as to the other plaintiffs in error. In view of this conclusion it is unnecessary to consider other points raised, which we have passed on in the Sylvester case, supra, adversely to the contentions of plaintiffs in error.

REVERSED.

Gridley, P. J., and Fitch, J., concur.

68 - 30884

PEOPLE ex rel. OTTO CEDERWELL,
Appellant,

v.

NICHOLAS R. FINN, et al.,
Appellees.

243 I.A. 621
Appeal from
Superior Court,
Cook County.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding on relation of Otto Cederwell, who seeks thereby to be restored to a position in the classified service of the City of Chicago, namely, the position of third assistant superintendent of streets, and to have an order of the Civil Service Commission cancelling the certification of his appointment to that position expunged.

We have already passed on the merits of the controversy on a prior appeal. (People v. Finn et al., 238 Ill. App. 17.) We there reversed the order of the trial court sustaining a demurrer to the first plea of the petition and granting the prayer for the relief prayed, and the cause was remanded with direction to overrule said demurrer. That plea set up that the appointment was void ab initio because made as the result of an original entrance examination instead of a promotional examination as provided by sec. 9 of the Civil Service Act. (Cahill's Stat., ch. 24, par. 693.)

When the cause was redocketed the trial court, in accordance with the direction, overruled the demurrer to said plea, and appellant electing to stand by the same the petition was dismissed. From that order this appeal is taken and thus presents the same question we have already decided as aforesaid.

While in any event we are bound by our former decision, we still adhere to the same and hold for the reasons stated in our former opinion that the demurrer was properly overruled.

AFFIRMED.

Bridley, P. J., and Fitch, J., concur.

69 - 30885

243 I.A. 621

PEOPLE ex rel.
WILLIAM J. H. SCHULTZ,
Appellant,

v.

NICHOLAS R. FINN et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal presents the same question on petition for mandamus by another relator that is presented in case No. 30884, People ex rel. Cederwell v. Finn et al., wherein we have this day affirmed the judgment of the lower court dismissing the petition after overruling a demurrer to a plea thereto by which appellant elected to stand. The petition is for a mandamus to restore the relator to a position in the classified service of the City of Chicago, and to expunge an order of the Civil Service Commission.

Both cases were heard on prior appeals raising the same question as to the sufficiency of said plea. For the reasons stated in People ex rel. Cederwell v. Finn et al., 238 Ill. App. 17, and in our opinion this day filed in the same case (No. 30884 aforesaid) the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

122 - 30940

JOSEPH WALCZAK and WALTER WALCZAK,
Doing Business as WALCZAK BROS.,
Appellants.

vs.

JULIA HAC,
Appellee.

243 I.A. 321
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellants brought suit on a judgment note for $300, and after a judgment by confession thereon was re-opened on the affidavit of defendant claiming in effect that her signature to the note was procured by fraud without her knowledge that she was signing a note, and without consideration therefor, the issues were submitted to the jury and the verdict was for the defendant. This appeal is from a judgment entered thereon. The main question for consideration is whether or not the verdict was against the weight of the evidence. We think it was.

It appears that on July 11th, 1925, defendant and her husband executed a contract appointing plaintiffs their exclusive agent to sell a certain piece of real estate for $7,000, the "contract to continue until 21st of July, 1925, and thereafter until terminated" by their giving plaintiffs five days notice in writing. The contract provided for a commission but for no particular per cent. Both parties to the contract, however, labored under the impression that the agency expired on July 21st. Prior to that time one of the plaintiffs, Joseph Walczak, had presented the property to two persons, one Kejewics and one King. The latter offered him $7,500 therefor, and the former said he would take it at $8,000. Joseph regarded the contract as an option and expected to make as his profit any excess a sale might bring over the purchase price.

two

Thinking his option expired on the 21st he sent one Oelech to have Mrs. Hac come to his office and sign a contract of sale. On coming she told him she was going to keep the property. After his submission of the property to Kejowicz and the latter's expressed willingness to purchase it, Kejowicz ascertained that it belonged to Mrs. Hac and went to her to negotiate directly for the property. Both Joseph and Oelech testified that when she refused to sign a contract of sale she agreed after some two hours of negotiation on the sum of $300, for which she then gave said note, for the surrender and cancellation of said "option," and on it he endorsed the words: "By settlement with Mrs. Hac for special consideration this option has been cancelled and void. July 21st, 1925, Walczak Bros. per L. Walczak." She took the cancelled contract so endorsed and immediately sent her boy to Kejowicz to tell him that she "was ready." Thereupon Kejowicz executed a contract with her for the purchase of the property for $7,875.

When she signed the note she claimed that she thought she was signing a receipt for the cancelled contract, and that Joseph told her that it was a receipt therefor. This was denied by both Joseph Walczak and Oelech, who testified to the negotiations for the surrender of the agreement (all of which we need not repeat here) and that the note was read or translated to her in the Polish language, (she being unable to read or write English) and that while it was payable in 60 days she said she would pay it in 3 or 4 days.

We have carefully reviewed the evidence and think that it preponderates in favor of the plaintiffs. The burden of proving fraud rested upon defendant. She failed to sustain it. We think it is clear from the evidence that when defendant found she could deal directly with Kejowicz and obtain more money than the contract with plaintiffs provided for, that she sought its

return and knowingly signed the note to procure it. One of the convincing circumstances is that she knew it was necessary to make a settlement with plaintiffs before she could safely proceed to make a sale directly to Kejowicz. She testified twice that when she sent her boy to Kejowicz she told him to say that the deal with Walczak was already settled. Later, on the suggestion of her counsel that she was "confused," she significantly changed her testimony on this material point. Kejowicz testified that the boy did so state, and also that she had told him that she had a deal with Walczak. There are other circumstances tending to support plaintiffs' theory of the case which, however, we deem it unnecessary to detail. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J. and Fitch, J., concur.

170 - 30989

243 I.A. 322

OTIS N. LaBARENCE,
Appellee,

v.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Appellant.

APPEAL FROM
CITY COURT,
CHICAGO HEIGHTS.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against appellant for $18,000 in a suit under the Employers' Liability Act for damages for loss of plaintiff's right leg, caused by the collapse of a structure, called a sand tower, while plaintiff and other employes of defendant were engaged in replacing a sill thereunder.

The facts are undisputed. The case went to the jury on plaintiff's evidence only, defendant standing by its denied motion for a directed verdict in its favor. For reversal it is urged (1) that plaintiff at the time of the accident was not performing an act of interstate commerce; (2) that there was no proof of negligence by defendant of its employes which proximately caused the injury, and (3) that plaintiff assumed the risk.

The case was submitted to the jury on two original and two additional counts of the declaration, and the plea of general issue. The original counts charged negligence in allowing and permitting the structure and its supports to be and remain in such condition that it fell on plaintiff while working about it. While we do not think the evidence supports

that theory of negligence we do think it was sufficient to warrant a finding of negligence in the manner of doing the work, charged in the second additional count, regardless of whether it supports the specific negligence charged in the first additional count of failure properly to support and brace the structure while removing a defective sill and placing a new one in its place.

The structure was built over a spur or lead track from defendant's main track, running about north and south, to a roundhouse. It supported a steel sand tank about 8 feet long and 5 feet in circumference, which at the time of the accident was nearly full of sand. The tank rested on four timbers or stringers, 16 feet by 8 inches by 16 inches, which extended over the track east and west and were supported on each side of the track by a so-called "bent" composed of two horizontal timbers parallel to the track, and three uprights between them. The upper horizontal timbers on which the stringers rested were 12 feet long by 8 inches by 8 inches. The lower horizontal timbers or sills, which were imbedded in and flush with the ground, were 14 feet long by 12 inches by 12 inches. The three upright or supporting timbers on which the upper horizontal timber rested were bolted together by two other timbers 6 feet long by 8 inches by 8 inches which run up from the center of the center upright to the top of the two end uprights or batter-posts. The three uprights so bolted together rested upon and were bolted to the ground timber or sill. The sills rested on blocks of wood imbedded in the soil.

The work in hand was to remove the east sill which had become defective and replace it with a new one, and to remove the

by 8 inches

northeast batter-post and replace it with a new timber.

Plaintiff was one of a gang of seven men engaged in the work under the general direction of a forman. They had been working about three and a-half or four hours when the structure fell. They first dug the soil from around the sill. Then they built small platforms for two screw jacks, on each of which was placed an upright timber about 10 or 12 feet long, underneath the east side of the structure supporting the tank. They then raised that side of the structure an inch or two off the east bent, so that the lateral support on that side consisted of simply these two uprights on the jacks. The foreman then said, though it does not appear that plaintiff heard the remark, "better wait awhile, fellows; it looks a little shaky." The gang rested for about fifteen minutes and then removed the old sill and put in a new one in its place. They then removed the northeast batter-post and, after a rest, undertook to put the new timber in its place. A rope was tied to one end of it and thrown over the northeast corner of the superstructure. Three of the men would lift the timber and then plaintiff and two others would pull on the rope. One of the men was on top of the bent to put the batter-post, when raised, into place. Just as he got hold of it the whole superstructure fell, crushing plaintiff's leg.

Passing for a moment the question of interstate commerce, which depends upon other facts, and considering the questions of negligence and assumption of risk, we think the proof bearing on each was sufficient to go to the jury and sustain its findings. They might well have inferred from the circumstances of the case that the pulling of such a heavy timber over one corner of the structure that was apparently

rendered shaky by the substitution of such temporary lateral support, brought such force and weight on that corner of the structure as to sway it from the supports, and that it was a dangerous and negligent manner of doing the work. That negligence may be inferred from the circumstances of a case as shown by the evidence is too well settled to require the citation of authority.

And we do not think, as contended by appellant, that the subject matter of inquiry was of such a character as to require testimony of persons of skill and experience in order to enable the jury to form a correct judgment about it. We think the facts were of such a nature that a jury of ordinary intelligence and experience could comprehend them sufficiently to draw correct inferences and base an intelligent judgment. (Yarber v. C. & A. Ry. Co., 235 Ill. 589.)

As to the assumption of risk, that, too, was a question of fact for the jury. Appellant invokes a general rule that a master is not required to furnish the employe a safe place where the nature of the work is such as to produce changes and temporary conditions in the place where the work is being performed. Discussing this rule in Barnett & Record Co. v. Schlapka, 208 Ill. 426, and cases supporting the doctrine, the court said that those cases apply only "where the work being done necessarily renders the place dangerous, as in mining coal, blasting stone, wrecking buildings, and other matters of a like nature." In that case the rule was not deemed applicable where the employe was injured from the caving in on him of a ditch or tunnel, in which he had been ordered to work. We do not regard the instant case as one coming within

the class of cases where the rule has been enforced.

No instruction on the question of assumption of risk seems to have been asked for or given to the jury. The question arises, therefore, only as one of fact, which it was competent for the jury to decide. It has frequently been held that it is a question for a jury to say whether or not the negligence charged and proven was so obvious that an ordinarily prudent person in the plaintiff's situation had opportunity to know and appreciate it, and thereby assumed the risk. (Chicago R. I. & P. Ry. Co. v. Ward, 252 U. S. 18; Chesapeake & O. Ry. Co. v. De Atley, 241 U. S. 310; Gila Valley, etc. Ry. v. Hall, 232 U. S. 94.) It was said in the last cited case that an employe is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employe becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known it. The court said:

> "Moreover, in order to charge an employe with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or, else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it."

In Butler v. Frazee, 211 U. S. 459, the court said:

> "Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employe must be held, as a matter of law, to understand and appreciate, and assume the risk of it."

There was sufficient evidence upon which to submit this question to the jury.

It was also said in Atlantic Coast Line Railroad Co.

the clause of cause where the suits has been endorsed.

[illegible] No instruction on the question of assumption of risk seems to have been asked for or given to the jury. The question arises, therefore, only as one of fact, which it was competent for the jury to decide. It has frequently been held that it is a question for a jury to say whether or not the negligence charged and proven was so obvious that an ordinarily prudent person in the plaintiff's situation had opportunity to know and appreciate it, and thereby assumed the risk. (Chicago R. I. & P. Ry. Co. v. Mayo, 222 U. S. 318; Chesapeake & O. Ry. Co. v. De Atley, 241 U. S. 310; Gila Valley, etc. Ry. v. Hall, 232 U. S. 94.) It was said in the last cited case that an employe is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employe becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known it. The court said:

> "Moreover, in order to charge an employe with the assumption of a risk attributable to a default due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or, else such danger must have been so evident that an ordinarily prudent person, under the circumstances, would have appreciated it."

In Boller v. Texas, 221 U. S. 488, the court said:

> "Where the elements and combination and of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employe must be held, as a matter of law, to contemplate and appreciate, and assume the risk of it."

There was sufficient evidence upon which to submit this question to the jury.

It was also said in Atlantic Coast Line Railroad Co.

v. Banks, 288 Fed. 826, that the employe was entitled to rely upon his foreman's better knowledge, unless he could for himself see and appreciate the danger. "Whether he could or should have done so was also a question for the jury." Most, if not all, of these cases were brought under the Federal Employers' Liability Act and seem applicable to the record before us.

As to the question of interstate commerce. We recognize the very close line of distinction made in facts bearing on this question, and deem it unnecessary to assume the task of reconciling the various authorities upon it. It is enough to say that the evidence tending to show that on occasions engines while engaged at the time in interstate commerce ran under the structure and obtained a supply of sand from the tank for their trip, was sufficient from which the jury might find as a question of fact that the sand tank was an instrumentality of interstate commerce. There are many decisions following the familiar case of Pedersen v. Delaware L. & W. R. Co., 229 U. S. 146, which support such a finding. Whether or not it can be supported on appellee's theory that in removing the sill it was necessary to dig away the outer portion of the roadbed to some extent and that, therefore, the work consisted of repairing the roadbed of a track that was used for interstate transportation, we think that so far as such use of the sand is concerned the test laid down in Shanks v. Delaware L. & W. R. Co., 239 U. S. 556, namely, a "work so closely related to it (interstate commerce) as to be practically a part of it," has been frequently applied to facts no more persuasive. (See Erie R. R. Co. v. Collins, 253 U. S. 77; The same v. Szary, 253 U.S. 96; Philadelphia B. & W. R. Co. v. Smith, 250 U. S. 101.)

It is enough to say as said in Brown v. Illinois Terminal Co., 319 Ill. 326:

> "If the evidence is such that reasonable minds might reach different conclusions as to whether the defendant and an injured employe were engaged in intrastate or interstate commerce it is a question for the jury to decide. (Pennsylvania Co. v. Donat, 239 U. S. 50; 1 Roberts on Federal Liability of Carriers, Sec. 461.)"

Accordingly the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

241 - 31061

TOM G. ROUMBOS, Administrator of Estate of Marie Roumbos, Deceased,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

243 I.A. 622

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in an action brought under the injuries act, charging negligence of the City of Chicago in kindling a fire on one of its streets and not guarding the same, or allowing the same to be unguarded, whereby a little girl four and a half years old came in contact with the fire and was burned to death.

The declaration is in four counts, to which defendant filed the plea of general issue and a plea denying ownership of instrumentalities causing the injury.

A motion to find for defendant was made at the close of plaintiff's evidence and renewed after defendant announced it would introduce no evidence. The motions were denied and the judgment aforesaid was entered on the jury's verdict for the sum of $5,000.

The points urged for reversal are (1) that no count in the declaration states a cause of action; (2) that there was no evidence to show that the person who built the fire was an employe of the city or that he was acting within the scope of his authority in so doing; (3) that the negligence charged was in the performance of a governmental function for which a municipal corporation is not liable.

The first count was eliminated from consideration in

the trial below, and the fourth count rests upon the claim of an attractive nuisance, which need not be considered, for the verdict will not be reversed if either of the other two counts be sufficient to sustain it. (Practice Act, Ch. 110, Sec. 78.)

The second and third counts charge that the city was possessed of said street and that a certain fire was kindled therein, the second count charging that the city negligently suffered the fire to remain unguarded, and the third count charging that the fire was kindled by one of the city's employes to burn rubbish and other combustible material in the street and was negligently and insufficiently guarded, whereby plaintiff's intestate, while ordinary care for her safety was being exercised in her behalf, came in contact with the flame and was burned to death.

While the second count specifically alleges that it is the duty of the city to keep and maintain the street in a reasonably safe condition for travel, both counts charge that the intestate was in the street when she came in contact with the fire, and that due care was exercised in her behalf. We are unable, therefore, to concur in the contention that the facts alleged in the second count are in no way connected with the duty of the city to keep and maintain the street in a reasonably safe condition for travel.

In support of the charges in these two counts it appears that the person setting the fire had a push cart bearing thereon the name of the "City of Chicago," that he was engaged in sweeping up papers and rubbish in said street, that he wore the uniform donned by the city street sweepers, that he was the same person who had been so engaged in said city on previous days, that he swept the rubbish close up to the curb and sidewalk where he set fire to it, and immediately left the same unguarded and unprotected; that the wind was blowing the flame toward the sidewalk and that the little girl, the intestate, was on the walk about three feet from

the fire when the blaze came in contact with her clothing, setting fire thereto, and thus causing the injuries resulting in her death. The undisputed testimony to such effect tended to establish, and presented, a prima facie case of facts sufficient to support the charge of both the second and third counts, from which the jury was justified, in our opinion, in finding against defendant on the several points urged for reversal.

As to the alleged defect in the third count, that it did not charge facts showing that the servant was acting within the scope of his authority, it is sufficient to say that the averment that he was so acting is one of fact, and it is unnecessary to allege the evidentiary facts necessary to prove it.

But it is urged that if the count is not bad in this respect it is defective in not alleging that the servant was not performing a governmental function. We think the acts which the counts charge as performed by the servant were ministerial in their character. We have so held in a similar case - that of Redtke v. City of Chicago, 240 Ill. App. 493-497, - where several cases of the Supreme Court bearing on this subject are cited. We need not again discuss them. Discussing facts bearing on this question in City of Chicago v. Seben, 136 Ill. 371, one of the cases so cited, the court said: "The adoption of a general plan of sewerage involves the performance of a duty of a quasi judicial character, but the construction and regulation of sewers and the keeping of them in repair, after the adoption of such general plan are ministerial duties, and the municipality, which constructs and owns such sewers, is liable for the negligent performance of such duties." Again it was said in Hanrahan v. City of Chicago, 289 Ill. 400: "A municipal corporation acts judicially when it selects and adopts a plan for the construction of a public improvement, but in carrying out such plan or in removing obstructions or dangers

from its streets it acts ministerially and is bound to see that the work is done in a reasonably safe and skilful manner." In Missano v. Mayor, etc. of the City of New York, 160 N. Y. 135, where a suit was brought to recover damages for the death of a child run over and killed by an ash cart of the street cleaning department of the city, the court held that the city acting in the discharge of a special power granted to it by the legislature with respect to cleaning the streets was exercising power as "a legal individual, as distinguished from its governmental functions when it acts as a sovereign." In Denver v. Davis, 37 Colo. 370, the city was held liable for its acts of negligence in connection with cleaning its streets, the court saying that "the city was acting in its private and corporate capacity through its health commissioner, for the convenience and benefit of its inhabitants and not as an agent of the State in the discharge of any governmental duty imposed upon it."

We think it needless to cite other authorities. Under the statute (Cahill's R. S. 1925, Ch. 24, par. 66, p. 367) among other powers given the city council is that to provide for the cleansing of streets, alleys, etc. Plans and provisions made for the exercise of that power belong to the city's governmental function, but the acts necessary to carry them out are clearly ministerial in character.

In view of this conclusion we need not consider alleged error in giving instructions recognizing such theories of liability, nor the refusal of the court to give an instruction offered by defendant based on a contrary theory of the case.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

251 - 31071

ETHEL N. MORSE,
Appellant,

v.

WALTER H. MORSE et al.,
Defendants below.

EDWARD J. STEVENS and
UNION TRUST COMPANY,
Appellees.

243 I.A. 622

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order sustaining the demurrer of appellees to a bill of complaint and dismissing the same for want of equity. The bill was filed to charge the income of a spendthrift trust payable to the husband of complainant with the amount allowed her as alimony for her support and that of their child, by a final decree of a California court in her suit for separate maintenance.

The bill rests upon paragraph 49 of the Chancery Act, commonly known as the creditors' bill paragraph (chap. 22, Cahill's Stat. 1925.)

It is the contention of appellees, who were the trustees under the spendthrift trust, that the demurrer was properly sustained, (1) because the court had no jurisdiction, the judgment relied upon having been obtained in a foreign state, and (2) that the funds in possession of the trustees under said trust could not be reached by any creditor of the beneficiary. Citing Steib v. Whitehead, 111 Ill. 247; Wagner v. Wagner, 244 Ill. 101; Congress Hotel Company v. Martin, 312 Ill. 318.

2431.A. 622

APPEAL FROM

CIRCUIT COURT.

DOC. NUMBER.

A.

Appellant,

v.

Defendants below.

Appellees.

MR. JUSTICE HARMON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order sustaining the demurrer of appellees to a bill of complaint and dismissing the same for want of equity. The bill was filed to charge the income of a spendthrift trust payable to the husband of complainant with the amount allowed her as alimony for her support and that of their child, by a final decree of a California court in her suit for separate maintenance.

The bill recites these particulars (omit. 12 commonly known as the so-called bill peculiar [omit. 13 bill's [omit. 1208.)

It is the contention of appellee, who sets the [illegible] transfer under the spendthrift trust, that the decree was properly sustained, (1) because the court had no jurisdiction, the judgment relied upon having been obtained in a foreign state, and (2) that the trust is inoperative of the trustee under said trust could not be attached by any creditor of the beneficiary. Citing Earle v. Tilghman, 117 111. 341;

[illegible] v. Jaquet, 264 111. 101; Chambers Estate [illegible] v.

As we are clearly of the opinion that the demurrer was properly sustained on the latter ground, we deem it unnecessary to discuss the former.

It appears from the bill that the trust was established by a will of the husband's mother which provided that no title or interest in any of the trust fund, or money or property composing the trust, should vest in her son, Walter H. Morse, complainant's husband, during the continuance of the trust, and that he should acquire no right or title to any installment of the income otherwise than by the actual payment of the same by the trustees and his receipt therefor; and that he should have no right or power to anticipate or encumber his share of the income to be received from the trust estate, or to give orders in advance for the same on the trustees.

The bill alleged that the trustees forwarded to the beneficiary approximately $500 a month from the income of said trust, and asked that they pay complainant the sum of $200 allowed for alimony, as aforesaid, and that said trustees be enjoined and restrained from paying over any of the income of said trust until the indebtedness for alimony due complainant is fully paid.

We deem it sufficient to say, without quoting at length therefrom, that the decisions above referred to are decisive of the point that the income of such a trust cannot be reached in the hands of the trustees. In discussing a similar trust provision made by a father for his daughter in Steib v. Whitehead, supra, the court said: * * * * the extent of her right was to receive the net accumulations of the trust estate from the hands of the trustee, and that these accumulations

did not become absolutely hers, so as to render them subject to legal process for her debts, until actually paid to her." It was said in Congress Hotel Company v. Martin, supra: "An owner of property having the necessary qualifications has a right to dispose of his property by will as he may see fit, with such limitations and conditions as he may choose to impose, not contrary to law."

Conceding the trust in question to be a spendthrift trust, counsel for appellant argues that these cases recognize that the creator of such a trust is limited "to proper legal restrictions," and that the cestui que trust will not be permitted thereby to avoid his legal obligations, and in this connection refers to the legal obligation of a husband to support his wife and children. But no provision of the trust is pointed out which interferes with the performance of such legal obligation, which it would be conceded may be enforced against the cestui que trust with reference to any property that absolutely belonged to him. The difficulty with complainant's position is that she seeks to enforce the obligation against a fund that does not belong to him, but to the trustees until it is actually paid into his hands. No authority is cited which places such a limitation upon the right to dispose of one's property by will as he may see fit, and no limitation or condition is fixed or pointed out in the will in question "contrary to law." The bill seeks to reach a fund that does not belong to the husband but one that is not absolutely his until it is actually paid over to him by the trustees.

Counsel refers to decisions in other states based upon a statute which provides that if there is a surplus of

ncome not required for the support of the beneficiary or his family, a court of equity may dispose of such surplus as justice nd equity may require. No such authority has been conferred pon a court of chancery in this state.

The decree dismissing the bill is affirmed.

AFFIRMED.

ridley, P. J., and Fitch, J., concur.

269 - 31089

DOUGHNUT MACHINE CORPORATION,
Appellee,

v.

JOHN RAKLIOS COMPANY,
a corporation,
Appellant.

243 I.A. 622

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1150, entered on the court's finding in an action to recover the price of a doughnut machine, delivered by the plaintiff to defendant.

The only questions argued are that the court's finding and judgment are against the law and the evidence, and that it refused to find as law certain propositions submitted as such.

The contract was verbal, plaintiff claiming it was for an absolute sale, and defendant that it was conditional on the machine proving satisfactory after trial. The testimony was very conflicting. Several conversations were had between plaintiff's salesman, Kirback, and defendant's president, John Raklios. Whatever the arrangement was it was embodied in these conversations. Raklios' version of them to the effect that the machine was to be taken on trial and accepted only in case it proved satisfactory, was supported by one of defendant's office employes who claims to have heard the conversations. Plaintiff's theory of the arrangement depends entirely upon the testimony of its sales agent who denied that the machine was to be sent on trial and accepted only in case it proved

243 I.A. 622

satisfactory. We have made a careful examination of the testimony and are not satisfied that a preponderance of the evidence as to the nature of the bargain rests with plaintiff, who had the burden of proof. There are certain circumstances which tend to confirm this view of the case.

It appears that plaintiff's sales agent saw defendant's president on several occasions with reference to purchasing a machine. The matter was finally turned over to defendant's head baker for investigation. He signed a contract in the name of defendant, without authority, on which one of plaintiff's electric machines was delivered. On defendant's president disclaiming his baker's authority to sign a contract plaintiff removed the machine and delivered it to another of its customers. Raklios indicated his willingness to take plaintiff's gas machine, on trial, as he says, and one was delivered. After a few days' trial defendant wrote plaintiff regarding the agreement about the doughnut machine "which," it said, "was to be sent us on trial for one month without any obligation on our part and if same would not stand the trial we were to return the same." The letter proceeded to state that the machine had after two weeks trial "proven very unsatisfactory, as we have had a great deal of trouble over it since this machine was put in. Will ask that you kindly remove this machine from our premises at your earliest convenience." To this letter plaintiff replied a week later claiming that it was "a direct order and not conditional," and that it could not take back the machine.

Defendant signed no order. Whatever the order was it was prepared by plaintiff's own agent.

satisfactorily. We have made a careful examination of the
testimony and are not satisfied that a preponderance of the
evidence as to the matters at the bargain route with plaintiff's
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which tend to confirm this view of the case.
It appears that plaintiff's sales agent Ray defendant's
president on several occasions with reference to purchasing a
machine. The matter was finally turned over to defendant's
head buyer for investigation. He signed a contract in the
name of defendant, without authority, an exhibit was of plaintiff's
position modified was delivered. On defendant's president dis-
covered the machine and delivered it to the shipper of the consignee.
claims indicated like willingness to take plaintiff's due meeting
trial, on the ruby, and she was delivered. After a few days,
the defendant wrote plaintiff requesting the agreement upon
which defendant "stood," it said, "was to be sent me on
trial for one month without any obligation on our part and if
we would not agree the right to return the same."
The letter proceeded to state that the machine had after was
taken into "Heaven [illegible] unsatisfactory, so we have had a hard
matter getting rid of it since this machine was put in. Will
you please see if you can kindly remove this machine from our premises as
our salesmen cannot." To this letter plaintiff replied
that it was "a direct order and was
satisfactory," and that it would not look into the matter.
Defendant signed no order. Thereafter the agent was
not permitted by plaintiff's men again.

Subsequent correspondence indicated each party adhered to its respective views of the transaction.

It does appear that there was considerable trouble with the machine and that plaintiff's operator was at defendant's place of business on several occasions to rectify the troubles.

Without detailing the evidence we are impressed from a perusal thereof that in view of the demands of defendant's business, in which it was required to supply its restaurants with about one hundred and forty dozen doughnuts a day, and the continuous trouble it had, that the machine did not work reasonably satisfactorily, and that it was understood between the parties that if it did not plaintiff was to take the machine back.

The fact that the sales agent did not make use of plaintiff's regular written contracts, as was evidently customary in its business, especially after defendant had repudiated the one signed by its baker, and defendant so shortly after the verbal arrangement stated an understanding thereof consistent with the circumstances, tends to give credence to defendant's version that the machine was delivered for trial and not on an absolute sale.

We think, therefore, the judgment should be reversed and in view of the very unsatisfactory character of the testimony the case will be remanded for another trial.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

tends

290 - 31110

243 I.A. 623

STEVE TELLIOS,
Appellee,

v.

PETER TIFFLES,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit on two promissory notes, of which defendant was the maker, payable to the order of his sister and endorsed by her. Judgment by confession, pursuant to power of attorney given therein, was entered for plaintiff as the holder thereof. After the judgment was opened up on leave given to defend the action, the judgment to stand as security, the case was put on the short cause calendar, and a jury trial was had. The verdict was for plaintiff, and for some undisclosed reason a new trial was granted and the cause transferred to another judge. When the cause came up the second time for trial defendant moved to strike the same from the short cause calendar, stating orally that the previous trial consumed more than one hour's time. The motion was denied. The affidavit on which the judgment by confession was opened up as aforesaid set forth as defenses to the action that the note had been paid, and that plaintiff was not a bona fide holder for value. Defendant claimed, and was accorded, the right to open and close the case. A jury was secured and defendant called as witnesses, plaintiff under section 35 of the Municipal Court Act, and then the payee of the note. The examination of both witnesses was brief and their testimony brought out nothing tending to establish either ground

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of defense. They were not cross examined. When more than an hour had been consumed in the trial, defendant's counsel, claiming that the court could not force the trial beyond that hour, moved that the cause be continued and take its usual place on the jury calendar. The court denied the motion and counsel announced "defendant rests."

No evidence having been introduced tending to support the defense, counsel for plaintiff moved for an instructed verdict. Defendant's counsel then said he would withdraw the remark that "defendant rests," and stand on his motion. After denying the motion the court asked him if there was any further evidence, and he replied that he would "take no further hand in the proceedings," thus abandoning his case.

What took place at the previous trial is not before us for review. It appears that the cause came up regularly before the judge presiding at the trial in question.

Construing the statute providing for placing cases on a "short cause calendar" this court has frequently held that when the trial has consumed more than an hour it is in the discretion of the court to allow it to be continued until completion, and that this court will not review the exercise of the trial court's discretion in the absence of the abuse of it. (See Morrison v. Parmelee, 222 Ill. App. 90, and cases cited.)

We fail to see that the record discloses any abuse of the court's discretion. The trial had run a little over an hour, and most of it seems to have been taken by dilatory tactics of defendant's counsel and without a bona fide attempt to put in a defense. There is nothing to indicate that plaintiff consumed any time except to answer unsound arguments and contentions of defendant's counsel. The court must have been impressed that

the defense was interposed solely for delay when with most of the hour consumed in fruitless argument on his motions defendant's counsel refused to avail himself of an opportunity to present it. The nature of the case is such that it seemingly would have taken but little additional time to present proof of his defense if defendant had any. Such refusal by his counsel and his standing upon a mere technicality, the non-observance of which did not prejudice him, did not evidence good faith and justified the court's action in directing a verdict confirming the judgment.

AFFIRMED.

Bridley, P. J., and Fitch, J., concur.

14 - 30403

243 I.A. 623

UNITED BOILER HEATING & FOUNDRY CO.,
a corporation,
Appellee,

v.

ACKERMAN-QUIGLEY PRINTING CO.,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $3813.85, entered upon a verdict in plaintiff's favor on the second trial of an action brought on defendant's check, payment of which was stopped by defendant. The first judgment was likewise for the plaintiff, but was reversed and the cause was remanded by this court because of the erroneous exclusion of certain offered evidence tending to prove the alleged failure of consideration for the check. (United Boiler Heating & Foundry Co. v. Ackermann-Quigley Printing Co., 256 Ill. App. 111.)

The check sued on was given to plaintiff on March 7, 1922, in part payment of the amount then agreed in writing to be due to plaintiff for installing two Geare-traveling-grate stokers in defendant's printing plant pursuant to a contract therefor made in October, 1920. After the stokers were installed, some questions arose as to the amount due, and because defendant was "still unsatisfied that the machines will stand up and do the work required of them;" whereupon an agreement was entered into, labeled a "settlement agreement," the substance of which is set forth in our former opinion. In that opinion, we held that the statement of claim recites facts which prima facie constitute a good

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cause of action upon the check therein described and that the relevant portions of the amended affidavit of merits were sufficient to show that the defense claimed was a total failure of consideration for the check and also a counterclaim for loss and damages occasioned by plaintiff's alleged breach of "warranty for two years operation." We also held that defendant was entitled to show, if it could, that when payment of the check was stopped, the stokers had broken down and failed to work because of "defective material and workmanship in the construction, erection and installation thereof," and that plaintiff was obliged to and did rebuild the stokers at a cost greater than the amount of the check on which the suit was brought. We also held that the guaranties in the original contract were superseded by those in the settlement agreement, and that all oral statements, representations, and alleged oral warranties made at or before the time the settlement agreement was executed were merged in that agreement, and therefore all evidence thereof was incompetent.

Upon this appeal, defendant's counsel attempt to again argue many of the propositions urged upon the first appeal. It is argued that the plaintiff's statement of claim does not state a cause of action, that the suit is not on a check but is for the amount due on the original contract, and that proof was admissible of verbal conversations occurring at or before the time the written settlement agreement was made, in which plaintiff is alleged to have orally promised to make the machines work "to the satisfaction" of defendant. These and similar contentions made on this appeal were made on the first appeal and were there decided adversely to the defendant. Even if that decision were not now "the law of the case," we see no reason to change the views we then expressed.

It is contended that interest on plaintiff's claim was not recoverable, for the alleged reason that interest means the "unjust detention of money." Even in that view, we cannot say the verdict is manifestly wrong. However, an unpaid check is a note, in effect, and interest on a note is expressly allowed by statute.

It is contended that plaintiff should have shown and did not show how it became the assignee of the original contract. The settlement agreement (which is set out in full in plaintiff's statement of claim) expressly recites that the original contract made with Geare & Company was assigned to the plaintiff "with the consent of" the defendant.

It is urged that the court improperly permitted plaintiff's attorney to ask leading questions and hypothetical questions on cross-examination of some of defendant's witnesses. The argument on this point seems to be a complaint as to the manner of asking the questions rather than to their substance. The abstract shows that whenever a proper objection was made, it was sustained. We think defendant has no reasonable cause of complaint in this respect.

It is next contended that the court erred in discussing with counsel, in the presence of the jury, the former opinion of this court. We do not find from the abstract that defendant's counsel objected at any time to these discussions in the presence of the jury or requested the removal of the jury while they were going on. In fact, it appears from the abstract that some of the discussions referred to did not take place in the presence of the jury, but in chambers. Counsel have not pointed out how defendant was or could have been injured by these discusions or the

remarks of the court or counsel. We think the case was fairly tried and that every opportunity was given to defendant to fully present its defense. None of the remarks made by the court indicated any opinion on any question of fact, and the instructions given appear to be without substantial error.

Some of the points made in defendant's brief are not argued, and the remainder, except those we have mentioned, relate to questions of fact. We have considered the arguments of counsel on the questions of fact, and are unable to say that the verdict was manifestly contrary to the evidence.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

506 - 30770

PEOPLE OF THE STATE OF ILLINOIS ex rel. ANDREW RUSSEL, as Auditor of the Public Accounts of the State of Illinois,
Complainant,

vs.

MICHIGAN AVENUE TRUST COMPANY, a Corporation, et al.,
Appellees.

In re. Intervening Petition of WESTERN MOTOR CAR COMPANY, a Corporation,
Appellant.

243 I.A. 623

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit court dismissing, for want of equity, the intervening petition of the Western Motor Car Company, who sought to recover in full deposits made by it in the Michigan Avenue Trust Company, an insolvent bank, on the last day it was open for business, and also certain deposits made before the last day. The petition and answer of the receiver were referred to a master in chancery, who heard the evidence in connection with the evidence heard upon 157 other similar petitions, and reported his conclusions, which for the most part were favorable to the petitioners and were wholly favorable to the claim of the Western Motor Car Company. On exceptions to the master's report, however, the exceptions were sustained and the petitions were dismissed. The Western Motor Car Company perfected a separate appeal.

The facts are practically the same in this case as in the case of the other 157 depositors (No. 30496), in which an opinion is filed at the same time this opinion is filed. The contentions are practically the same and the briefs and arguments

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are substantially alike.

For the reasons stated in the opinion filed in that case, the decree of the Circuit court will be reversed and the cause remanded with directions to enter a decree granting the prayer of the petition as to all of the last day's deposits, and denying the petition as to deposits made prior to the last day.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

243 I.A. 623

243 I.A. 62

24 - 30810

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JOSEPH LAMORNAUX, Defendant in Error,

v.

CITY OF CHICAGO, a Municipal Corporation, et al., Plaintiffs in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This writ of error seeks to reverse a final order directing a writ of mandamus to issue.

The relator obtained a judgment in 1921 against the City of Chicago and the Northwestern Elevated Railroad Company. From that judgment separate appeals were prayed by the defendants to the Appellate court. The Railroad Company perfected its appeal by filing its appeal bond, but on its motion the appeal was dismissed at its costs by the Appellate court in October, 1921. No appeal was perfected by the City, nor was any writ of error sued out by it.

In November, 1924, the relator filed his petition against the City and its mayor, treasurer and comptroller, setting forth these facts and the further fact that the Railroad Company had paid, on account of the judgment, $2850, but that no payment had been made by the City of Chicago and no provision had been made for such payment, and praying that the defendant officers of the City be required by mandamus to issue and sign a warrant payable to the relator for the balance due upon his judgment, and that in the event there shall be insufficient funds available for that purpose in the city treasury at the time of the issuance and serving of the writ of mandamus that the City of Chicago, by

243 I.A. 629

its authorized officers, proceed forthwith to levy and collect a tax sufficient to pay the judgment. The petition alleges that the petitioner has often requested the City to pay the balance due upon his judgment, but the City has neglected and refused to do so, and that a few days before the petition was filed, relator caused a demand for such payment, in writing, to be served upon the defendants, giving the date of the judgment and the name of the court in which the judgment was rendered and the title and number of the suit. The petition also alleges that the City of Chicago has money in its treasury which has been appropriated for the purpose of paying judgments "which have been or may be obtained against it," and has on hand $447,000 available for that purpose.

To this petition the defendants filed a general demurrer, which was overruled, and thereupon they filed four pleas.

The first plea states that the fiscal year for the City of Chicago begins January 1st; that in 1924 there was no appropriation by the city council for the payment of relator's judgment and that the mayor, city treasurer and city comptroller have no authority to draw a warrant for such payment in the absence of an appropriation for that purpose.

The second plea states that the cause in which the relator's judgment was entered was an action in tort, that while the suit "was still pending on appeal there was an accord and satisfaction," and that the relator accepted $2850 "in full settlement from one of the joint tort-feasors, thereby releasing the City of Chicago."

The third plea, without mentioning any appeal, states that when the judgment was rendered the relator accepted $2850 "from one of the joint judgment debtors in full settlement of the

judgment," and thereby the City was released.

The fourth plea states that after judgment was rendered, a written agreement was entered into on October 1, 1921, which is set forth in haec verba in the plea, and that by reason of that agreement the City of Chicago was released. The agreement thus set forth recites the recovery of the relator's judgment and states that the Railroad Company had filed its appeal bond and was "desirous of being relieved of the necessity for perfecting its said appeal," and "of the hazard of further litigation in said matter," and that the relator is willing that the Railroad Company should be so relieved, "but is unwilling to release" it from liability, therefore, in consideration of $2650, the relator agrees that "he will not take out any execution or other process against it for the purpose of enforcing, as against it, the said judgment," and that he will not bring any suit on the appeal bond nor seek any damages against the Railroad Company by reason of its failure to prosecute its appeal, "the object and intent of this agreement being to permit the party of the second part" (the Railroad company) "and its surety to avoid the necessity of further litigation and to rest in peace, but not to release it or any other person or corporation from liability by reason of said judgment or said appeal bond, nor from the cause of action upon which the said judgment is founded."

To these pleas the petitioner filed a general and special demurrer, which was sustained by the court, and the defendants elected to stand on their pleas, whereupon it was ordered that a writ of mandamus issue, as prayed in the petition.

In support of their contention that the first plea is good, counsel for defendants cite the several provisions of the Cities and Villages Act relating to the making of appropri-

ations, the passage of the annual appropriation bill and the annual tax levy ordinance, and insist that under these provisions, the failure of the council to make an appropriation specifically providing for the payment of the relator's judgment, is a good defense to the petition. The contrary was held in City of Cairo v. Campbell, 116 Ill. 305, where a judgment similar to that in this case was affirmed, notwithstanding the fact that no appropriation had been made for the payment of the plaintiff's judgment. It was there held that the owner of an unsatisfied judgment against a city is not concluded by the failure of the city council to include the amount of such judgment in the annual appropriation bill, but that after a demand upon the city for payment, he may compel the latter, by mandamus, to levy and collect a tax for its payment. The petition in this case shows that a written demand for the payment of the judgment was made upon the defendants in November, 1924. In City of Cairo v. Everett, 107 Ill. 75, referred to in the Campbell case, supra, it was held that such a demand includes a demand to do any particular thing necessary to be done to enable the city council to make payment thereof. The demand came too late to have the amount of relator's judgment included in the 1924 appropriation bill, but, nevertheless, under the cases cited, the demand was necessary, and was sufficient, to notify the City and its officers that petitioner elected to have his judgment paid, thereby making it the duty of the city authorities to do whatever was required to be done thereafter to accomplish that result. If it be true, as alleged in the petition, that at the time of such demand there was money in the treasury available for such payment, then clearly it was the duty of the city officers to issue a warrant for the

payment of the judgment. The plea does not allege that there was no money in the treasury available to pay the judgment, but merely alleges that no appropriation had been made in 1924. Therefore, the first plea is not a good plea to the averments of the petition, and the demurrer to it was properly sustained.

We regard the second and third pleas, however, as tendering an issue of fact. Both state, in substance, that the payment made by one of the judgment debtors was made and accepted in full settlement of the judgment. This statement is admitted by the demurrer, and is a good defense to the petition. The demurrer should have been overruled to those pleas. We cannot assume (in the absence of anything in the record showing that such was the fact) that the reason the court sustained the demurrer to the second and third pleas was because of the facts alleged in the fourth plea.

The facts stated in the fourth plea are not sufficient, in our opinion, to show that the judgment has been or was intended to be fully satisfied by the judgment creditor's acceptance of $2850 from the Railroad Company. The principle involved, we think, is the rule announced in Parmelee v. Lawrence, 44 Ill. 405, "that where the release of one of several obligors shows upon its face and in connection with the surrounding circumstances that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out." This rule was re-affirmed in Clark v. Mallory, 186 Ill. 227, where, although the court held that no such intention appeared upon the face of the instrument there under consideration, yet the court said that if such had

been the intention, it "could very easily have been made to appear from the face of the instrument * * * in which case the agreement might, as is now contended, properly have been construed as a covenant not to sue." We conclude, therefore, that the court properly sustained the demurrer to the fourth plea.

For the error mentioned in sustaining the demurrer to the second and third pleas, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

107 - 30925

243 I.A. 624

RUBENA SHAW, also known as Rubena Bautsch,
Appellant,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered upon a finding for the defendant in a suit brought on a life insurance policy written by defendant. Defendant offered no evidence, and the only question presented by the appeal is whether plaintiff made a prima facie case by the evidence introduced in her behalf.

The policy in question was written by the defendant May 28, 1900, insuring the life of Anton A. Bautsch, the former husband of the plaintiff, in the sum of $1000, in consideration of the annual payment of a premium of $39.60 until ten full years' premiums shall have been paid. Upon its face, the policy was made payable, at the death of the insured, to his legal representatives, but by a provision indorsed on the back of the policy, made in July, 1900, the defendant agreed to pay the amount of the insurance to the plaintiff. The policy contains a provision that the insured may borrow from the Company the amount specified in a table of cash loans written in the policy by assigning the policy "as security in accordance with the terms of the Company's Loan Certificate: provided five per cent interest on the whole amount of the Loan is paid annually in advance." There is also a provision that at the end of each

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fifth year from the date of the policy it will be credited, if then in force, with a dividend from the surplus apportioned by the Company to policies of the same age and kind, which may be applied to purchase a paid-up addition to the policy.

It appears from the evidence that the policy became a paid-up policy, presumably in 1910; that three dividend additions were made, in 1905, 1910 and 1915, respectively, aggregating $208 of additional insurance; that in June, 1917, Anton Bautsch borrowed from the Company, apparently without the consent of the beneficiary, $411, and signed a "Loan Certificate," by which he assigned the policy to the Company, "and all profits and benefits now due or which may hereafter become due thereon, to secure the repayment of said loan and the interest thereon as herein provided." The loan certificate contained provisions that any dividend declared on the policy may be applied by the Company toward the payment of the loan and unpaid interest, if any; that if the policy should lapse or become forfeited, the amount of the loan and accumulated interest should be deducted from any cash surrender value of the policy or "shall operate in accordance with the rules of the Company to reduce the amount of any paid-up life or endowment policy, * * * as may be provided by the terms of said Policy." The policy further provides: "Fifth - That if the said loan with interest accumulated and accrued thereon at any time shall become equal to the legal reserve on the said Policy, the Policy shall be forfeited or void provided such loan with the interest accumulated and accrued thereon be not reduced to less than the said reserve within one month after notice to that effect shall have been mailed by the Company to the last known address of the insured."

It further appears from the evidence that about the time the loan was made, plaintiff was divorced from Anton Bautsch, and that at the time of his death, on June 27, 1923, he lived in Pocatello, Idaho; that the insurance policy was sent to the plaintiff by the administrator of the estate of Anton Bautsch, deceased, about three months after his death; that thereupon plaintiff, in October, 1923, made proof of loss according to the terms of the policy and demanded payment of the amount due; that in reply defendant's Chicago manager wrote her a letter returning the policy with the statement that he was advised by the home office "that on June 26th, 1922, the company notified the insured that unless the loan then outstanding under this policy was reduced on or before July 25th, 1923, to an amount less than the reserve value of the policy, the company would be obliged to cancel the policy," but that the loan was not reduced and the policy was "automatically cancelled as of Sept. 1st, 1922." A witness called by the plaintiff, who was an actuary or supervisor for the defendant, testified, hypothetically, that if the policy was in force on June 27, 1923, the loan on that day would have amounted, with accumulated interest, to $833.05, and that "the full reserve value would have been considerably less." It does not appear that the witness included in such reserve value the value of the additional insurance.

It is clear that the letter of the Company's manager in Chicago, that he had been advised by the "home office" (which was in Newark, N. J.) that a notice was sent to the insured as above stated, cannot be considered as any evidence that such a notice was ever, in fact, "mailed to the last known address of the insured," as required by the policy before a forfeiture can be claimed;

and if the insured was, in fact, notified as stated in the letter, the notice gave him until July 28, 1923, to reduce the amount of the loan, and that time had not expired when the insured died.

Prima facie, therefore, the case made by the plaintiff was sufficient to entitle the plaintiff to a finding in her favor for the amount of the paid-up policy with its additions, less the amount due on the loan. Apparently a fourth dividend on the policy was due in May, 1920, which, under the terms of the loan certificate, might have been "applied by the Company toward the payment of said loan and any unpaid interest, anything to the contrary in the policy notwithstanding." The amount of such dividend, if any, does not appear from the evidence.

Defendant's counsel state in their brief that it was incumbent on the plaintiff to prove that the policy was in full force and effect at the date of the death of the insured and that "it could never be in full force and effect with a loan outstanding against it." What counsel mean by this statement is, probably, that by the assignment of the policy to the Company when the loan was made, the latter became the legal owner of the proceeds of the policy. The assignment, however, was only as security for the payment of the loan. The policy was not thereby cancelled or paid, but remained in full force and effect for the benefit of plaintiff as well as defendant. The burden was on the defendant to prove that the policy had been forfeited according to its terms, if such was the fact.

For the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

183 - 31002

243 I.A. 624

HELEN KEITH HERBOLD,
Appellee,

v.

OLIVE MOU et al.

APPEAL OF HENRY RABE,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In this case, the defendant Henry Rabe appeals from a judgment for $2000 rendered against him and Olive Mou, owners of automobile delivery trucks, for damages for personal injuries sustained by the plaintiff.

In October, 1923, while standing on the sidewalk at the southwest corner of Austin avenue and North Franklin street, Chicago, plaintiff was struck and injured by the Ford truck of defendant Mou. That truck came south on Franklin street at a rate of speed variously estimated at from ten to twenty-five miles an hour, and on reaching a point near the center of the intersection swung around in a southwesterly direction to avoid striking appellant's Autocar truck, which at that moment was either going west on Austin avenue at a speed of eight to twelve miles an hour, or had stopped and was waiting there for the Ford truck to pass.

There are three counts in the declaration. The first charges negligence generally in the operation of both trucks, the second charges wilful and wanton misconduct in the operation of both trucks, and the third charges negligent violation of the Motor Vehicle act by both trucks, in that both were operated at rates of speed exceeding ten miles an hour over the streets

2431.A. 624

mentioned, which, it is alleged, were public highways passing through "the closely built-up business portion of the city of Chicago." Each of the counts contains the averment that by reason of the stated negligence of defendants, a collision occurred, and that the truck of the defendant Mou "was thereby struck, thrown and pushed into, upon and against the plaintiff," resulting in the injuries described.

From this declaration, the verdict thereon, and the briefs of counsel, it appears that appellant has been found guilty of negligence or wantonness, or perhaps both, because the jury believed from the evidence that appellant's truck was being driven at the time of the alleged collision at a rate of speed exceeding ten miles an hour on a public highway passing through a closely built-up business portion of the city of Chicago, in violation of section 22 of the Motor Vehicle act, or that the driver of appellant's truck failed to give the right of way at the intersection to Mou's truck, as required by section 33 of the same act; and that as a natural consequence of one or both of such acts of appellant's driver, Mou's truck was hit by appellant's truck with such force as to be thrown or pushed against the plaintiff while she was standing on the sidewalk at the southwest corner of the intersecting highways. Appellant contends that there is no evidence of such negligence or wanton misconduct on the part of appellant's driver, and also that there is no evidence that Mou's truck was pushed or thrown against the plaintiff by appellant's truck, as alleged in all the counts of the declaration.

Aside from the plaintiff, who testified that she did not remember what occurred except that she stood on the corner, waiting for a truck to pass which was coming west on Austin

avenue, there were three eye-witnesses. Two of these were the truck drivers. The third was a pedestrian, named McDonald, who had just crossed Franklin street on the north side of Austin avenue, and was standing, at the time of the accident, on the northwest corner.

Both McDonald and appellant's driver testified that the latter stopped his truck before entering the intersection; that he then started up, went about fifteen feet at a speed estimated by him at eight miles an hour and by McDonald at twelve, and then stopped a second time, with the front end of the truck approximately at the center of the intersection, between the south-bound and the north-bound tracks of a street car line on Franklin street; that while appellant's truck was standing there, Mou's truck, coming south on the south-bound street car track in Franklin street at a speed of twenty or twenty-five miles an hour, swung around to the west in front of appellant's truck, and, without slackening his speed, ran on in a southwesterly direction to and over the south curbstone of Austin avenue, pinning plaintiff against a fire plug on the sidewalk; and that in passing appellant's truck, the rear fender of the Mou truck scraped against the front end of appellant's truck.

The driver of Mou's truck testified that when he was fifteen feet north of the center line of Austin avenue, going south on the south-bound street car track in Franklin street, he for the first time saw appellant's truck, which was then about twenty feet to the east of him; that he could not swear that his truck was hit by appellant's truck, but after the accident was over, he saw a dent in one of the doors in the rear end of the body of his truck, and "surmised it was from that."

While it is true that this last witness testified that appellant's truck "did not stop at the intersection of Franklin Street," yet in view of his own statement that he did not see appellant's truck until it was twenty feet from him, it is obvious that he did not know whether appellant's driver stopped before entering the intersection. However, the evidence of the other eye-witnesses that appellant's truck was not moving, but was standing still, at the time of the alleged collision, is not otherwise contradicted; and therefore, as the record stands, there is no credible evidence supporting the averment contained in every count of the declaration that the Hou truck was pushed or thrown against the plaintiff by reason of any alleged negligent or wanton act of appellant.

Furthermore, there is no evidence that appellant was guilty of the negligence charged. The highest estimate given by any of the witnesses of the speed of appellant's truck while crossing the east half of Franklin street within the intersection, is twelve miles an hour. Under section 22 of the Motor Vehicle act that rate of speed is not even prima facie evidence of negligent driving unless it occurs on a public highway "where the same passes through the closely built-up business portions of any incorporated city, town or village." We find no evidence in the record that the place where the accident happened is a closely built-up business portion of any city. There is no evidence on that subject. Appellee's counsel say that this court will take judicial notice that such is the fact, but the rule in this state is to the contrary. (Dougherty v. The People, 118 Ill. 160; Gunning v. The People, 189 Ill. 165; Brun v. Macey, 267 Ill. 353.) Under the Dougherty case, supra, we may not even take judicial notice that Franklin street and Austin avenue are within the corporate limits

of the city of Chicago. Certainly, therefore, we may not go further and assume without proof that this intersection is in a closely built-up business portion of the city of Chicago.

As to the claimed failure of appellant's driver to give the right of way to Mou's truck, it is not clear from the evidence that appellant's truck was not well within the intersection before Mou's truck reached it. The evidence on that point is contradictory. But if it be conceded that the latter had the right of way, there is nothing in the evidence, beyond mere conjecture, to show that appellant's driver did not yield the right of way to the Mou truck, as two witnesses testified. There is no evidence that appellant's truck went into the intersection further than about the center. This left the west half of the intersection free for the passage of the Mou truck, and the west half of Franklin street was not only the proper place for it to travel in when going south, but appears to have been of ample width for that purpose.

Other errors are assigned, but in view we take of the facts proved and omitted, it will be unnecessary to discuss them.

For the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

216 - 31035

243 I.A. 624

H. C. LUST,
Appellee,

v.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $24.61 entered upon a finding in favor of the plaintiff in a suit for damages for breach of contract.

Plaintiff is a Chicago lawyer. While he was in Kansas City, Missouri, attending an interstate commerce hearing, he had two transactions with the defendant.

In the first, he sent a telegram, about eight o'clock in the morning, to a woman employed in his office in Chicago, saying: "I am calling you on long distance at 12:30 today." By an error in transmission, the figures "12:30" were "2:30," when the message was delivered. Plaintiff called his office by long distance telephone at 12:30 that day, but his employee was "out to lunch," and plaintiff thereby lost the amount he had paid for the telephone call, $2.85.

The second transaction occurred two days later. He caused his office to pay defendant $150 to be transmitted by wire to him in Kansas City, and although his office signed the usual order for the payment of that sum to him without identification, he had difficulty in satisfying the defendant's operator of his identity. When he finally succeeded, the operator gave him a check. He demanded the money, but the

operator refused, telling him he could cash the check at the hotel or the bank. The hotel and the bank refused to cash it without the indorsement of someone known to it, and he spent several hours time securing such an indorsement, before the check was paid. Plaintiff testified that the value of his lost time was $50 to $100, and that he paid defendant $1.75 for its charges for transmitting the money. The trial court awarded him $20 for his lost time and the two items of $2.85 and $1.75 for the cost of the long distance telephone call and the telegram.

As to the first transaction, we think the court was right in allowing plaintiff the cost of his telephone call. Appellant's only objection to this item is that it claims there is no testimony tending to prove that plaintiff's employee would or would not have been at her place of business at 12:30. The telegram shows on its face that the purpose of sending it was to make sure that she would be at his office at that time to respond to his long distance call. The defendant knew this from the language of the telegram and was therefore liable for the amount paid for the telephone call, as damages necessarily resulting from its failure to correctly transmit the message.

As to the money transaction, it was defendant's duty to pay the money to the plaintiff upon his request; and if he had insisted, without avail, upon payment in money, the defendant would have been liable to him for the amount withheld, with interest and the charges he had paid to defendant. He was not bound to accept defendant's check instead of the money. But, after an argument with the operator, he did accept the check, and a few hours later received the money. There was no breach, therefore, of defendant's contract, so far as the same required

it to transmit and deliver the money; and the only proximate result of the operator's failure to pay him the money on demand, instead of the check, was a few hours delay, caused principally by his inability to find an acceptable indorser. Ordinarily, the measure of damages for the nonpayment of money when due is interest from the time of the default to the time the money is paid; and this rule applies to the failure on the part of a telegraph company to perform its agreement to transmit money to a person at a distant point. (Smith v. Western Union Telegraph Co., 150 Pa. St. 561; Jones on Telegraph and Telephone Companies, §567; 37 Cyc. 1775.) An exception to the rule is recognized where the telegraph company has notice, at the time of making the contract, of such special facts or circumstances as to justify the conclusion that special or unusual damages are within the contemplation of the parties. (Ibid.) But there is no proof in this case relating to the money transaction, to bring it within this exception. It follows that the court erred in allowing plaintiff for his lost time and for the cost of transmitting the money.

The judgment is reversed for the reasons stated, and the facts being undisputed, a judgment will be entered in this court against the defendant for $2.35. Each party will pay his or its own costs in this court.

REVERSED AND JUDGMENT HERE.

Gridley, P. J., and Barnes, J., concur.

226 - 31045

243 I.A. 624

G. A. SCHILLINGER,
Appellee,

v.

THE NORTH AMERICAN OIL & MFG. CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In this case, a judgment by confession was entered against defendant for $250 rent due for the months of May and June, 1925, and $20 attorney's fees. Later, the judgment was opened and a trial was had on the merits, at the conclusion of which the court directed a verdict in plaintiff's favor and entered an order confirming the judgment. The defendant appeals.

The lease between the parties was for a term of five years beginning January 2, 1924. Defendant occupied the leased premises until April 30, 1925, and paid the stipulated rent, irregularly, for the time it was in possession. It claims that the written lease was cancelled in December, 1924, and that a new agreement was made at that time permitting defendant to remain in possession and pay rent at the same rate called for by the lease until it could secure other suitable quarters. Plaintiff admits that he wrote a letter to defendant on December 8, 1924, in which defendant was told that its lease of the premises in question was "hereby cancelled" for nonpayment of rent for the months of November and December, 1924, and was told to vacate the premises. To this letter defendant replied, on December 13, 1924, as follows:

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Appellant.

Appellee.

"In answer to your letter of the 8th inst. requesting vacating of premises at 2333-35 N. Hoyne Ave., we herewith accept this cancellation of lease and will comply with your request to vacate as soon as we have found another site; however, you realize that a plant of this kind cannot be removed at a moment's notice and it will require some time to locate a suitable place and remove all our equipment.

"In the meantime, we will continue to pay you rental at the rate covered by the cancelled lease viz. $125.00 per month until we have removed all our plant equipment."

It does not appear from the evidence that plaintiff made any reply to this letter of defendant. The record shows that two checks of defendant, the first dated December 6, 1924, for $125, marked "Nov. rental," and the second dated December 13, 1924 for the same amount, marked "Rent for Dec.," were paid to plaintiff on December 23, 1924; and that in January, February and March defendant paid rent to plaintiff by checks marked in the same manner. The April rent was not paid until after a judgment by confession was entered, and it was then paid together with $20 atterney's fees included in the judgment by virtue of the warrant of atterney in the lease. It appears that defendant did not occupy the premises during May and June, 1925, and it further appears that about July 1st, 1925, plaintiff tore down a building on the premises formerly used by defendant.

At the time the verdict was directed, the trial judge gave as his reason for so doing that "the court finds that the lease was in effect." Whether the lease was in effect in May and June, 1925, depends upon the question whether a new agreement was made in December, 1924; and that, in turn, depends upon the question whether the minds of the parties ever met on the counter-proposition made by defendant in its letter of December 13, 1924, above quoted. These are questions of fact. All the facts and circumstances shown by the evidence are as consistent with defendant's theory that the lease was cancelled and a new

agreement made, as with plaintiff's theory that the written cancellation made by plaintiff on December 3, 1924; and accepted in writing by defendant five days later, was thereafter revoked and the lease restored. The solution of these questions of fact was the province of the jury, and it was error for the court to direct a verdict.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

235 - 31055

ETHEL LEVY,
Appellant,

vs.

A. E. POHL,
Appellee.

243 I.A. 625

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

After a judgment by confession for three months' rent, at $75 a month, had been opened to allow defendant to defend on the merits, a hearing was had resulting in a finding and judgment for the defendant. Plaintiff appeals.

The lease demises a third floor flat for a term beginning May 1, 1925, and ending September 30, 1925, provided sixty days' written notice is given by the lessee of his intention to terminate the lease on the day last mentioned, otherwise it should continue from year to year until terminated by a like notice in some ensuing year. This lease was negotiated and signed in plaintiff's name by her husband, who appears to have had full charge and management of the property and who was authorized by the plaintiff, as she testified, to negotiate leases and collect rents in her behalf. When the lease was delivered, there was also delivered to defendant a written statement purporting to be signed by the plaintiff, as follows: "It is understood that A. E. Pohl is to receive $2.50 for each and every month until lease expires, September 30, 1925." Defendant testified that when these papers were handed to him, he noticed the sixty days clause and said to plaintiff's husband that he would give a written notice at once, but the husband replied: "That is unnecessary. I am acknowledging right here, you have a right to move."

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Defendant did not give to the plaintiff any written notice of his intention to terminate the lease, but vacated the premises on September 29, 1925, and delivered the keys to the plaintiff. The confession was for the rent for October, November and December, 1925, and the sole question involved is whether the giving of the written notice required by the lease was waived.

Plaintiff contends that the rule is that a sealed executory contract cannot be changed or modified by a parol agreement. In Fuchs v. Peterson, 315 Ill. 370, after stating that such is the general rule established in this state by many decisions, the court said: "It is equally well settled that a party to a written contract may by parol waive performance of a condition which was inserted in the contract for his benefit." It was also said that "such waiver is held not to be a modification or change in the terms of the original agreement," citing cases to that effect both in equity and at law. The same principle is again stated in Neil v. Kennedy, 319 Ill. 75, at page 80 of the opinion. In Fuchs v. Peterson, supra, it was held that the requirement of a written notice of an election by the lessee to exercise an option for a new lease, contained in his existing lease, was waived where the lessee gave verbal notice to the lessor, who told him that no further notice would be necessary. We think these cases are decisive against the plaintiff's contention in this case.

It is also urged that the plaintiff's husband had no authority to "change provisions in the lease." As above stated, the cases cited hold that a waiver such as is involved in this case is not a change in the terms of the original agreement; but if such were not the fact, we think the evidence is sufficient to show that plaintiff's husband had full authority to act for her in the matter.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

244 - 31064

THOMAS F. CRONIN,
Appellee,

vs.

NICHOLAS R. FINN et al.,
Appellants.

243 I.A. 625

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the Superior court entered in a certiorari proceeding committing to jail the civil service commissioners of the city of Chicago and the chief of police of that city until they "certify and reinstate" the petitioner (appellee) to his position as captain of police.

The petition on which this order was entered alleges that for seven years prior to November 21, 1919, petitioner was a captain of police in the city's service; that by an order entered on that day by the civil service commission he was discharged; that on December 29, 1925, an order was entered in the certiorari proceeding finding that petitioner was discharged for political reasons and ordering and adjudging "that the record of the Civil Service Commissioners as herein returned discharging the petitioner be and the same is hereby quashed and for naught esteemed;" that Morgan A. Collins was then chief of police and, under the city ordinances, was "charged with the duty of assigning and permitting members of the police department of said city to perform their duties and functions;" that said Collins was present in court when the order of December 29, 1925, was entered and had full knowledge thereof; that the next day petitioner applied to Collins for reinstatement on the police force and asked to be assigned to his old position or "such other position on said police force as said chief of police desired," but that Collins refused to permit him to assume his former position of captain and refused to assign

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him to any duty on the police force; that on January 13, 1926, petitioner served a written notice on the chief of police and the three civil service commissioners requesting that he be certified to his position of captain of police, but that each and all of the respondents wilfully refused and neglected "to comply with the judgment of this court." The petition prays for a rule on the respondents to show cause why they should not be held in contempt of court "for failure to obey and comply with" the order entered December 29, 1925. On the return day of the rule, the respondent Collins filed a sworn plea to the jurisdiction stating that he was not a party to the certiorari proceeding and was neither directed nor required by the judgment entered in that case "to do any act or perform any official service thereunder." The court at once denied the plea and ordered Collins to answer or demur to the petition, whereupon he filed a general demurrer, which was overruled, and he elected to stand on his demurrer.

At the same time, the civil service commissioners filed an answer stating that they were advised by counsel that the judgment entered in the certiorari proceeding is self-executing and neither demands nor requires any official act on their part to give it full force and effect; that they did not violate or ignore it by act, omission or intention; that no certification such as the petitioner alleges he demanded is required, by law or the order of the court, to reinstate him on the police force.

The record recites that upon consideration of the petition, the answer of the civil service commissioners, and the default for want of an answer of the chief of police, the court finds the facts to be as stated in the petition and that upon the entry of the judgment order in the certiorari proceeding it became the duty of the civil service commissioners "to certify the petitioner herein to the superintendent or chief of police to his

position of captain of police on the police force of the city of Chicago," which they wilfully refused and neglected to do, and that they and the chief of police are in contempt of court "for failing to reinstate" the petitioner on the police force. The order of commitment followed this finding.

We are of the opinion that the order of commitment cannot stand as to any of the respondents. As to the chief of police, the demurrer to the petition should have been sustained. It appears from the petition and the order of commitment that he was not a party to the certiorari proceeding and that he was not commanded by the order of December 29, 1925, to do or refrain from doing any act whatever. Under such circumstances the court had no power or jurisdiction to order him to be punished for an alleged noncompliance with that order. (Johnson v. Von Kettler, 66 Ill. 63.)

The civil service commissioners should have been discharged upon their answer, for the reason that the order quashing the proceedings of the civil service commission did not require any action on the part of the civil service commission to give it force and effect. It was self-executing. When it was entered, the previous order of the commission, discharging the petitioner, was thereby vacated, set aside and, as the order itself states, "for naught esteemed." Except for the right of the respondents to have the order reviewed upon appeal or writ of error, that order was the end of the certiorari proceeding. No other order was necessary or proper to be entered in that proceeding. "The only office of the common law writ of certiorari is to bring before the court the record of the proceedings of an inferior tribunal for inspection, and the only judgment to be rendered is, that the writ be quashed or that the record of the proceedings be quashed." (Cass v. Duncan, 260 Ill. 226. See also Funkhouser

v. Coffin, 301 Ill. 287, and Hamilton v. Harwood, 113 Ill. 154.) The judgment of December 29, 1925, conforms to this practice. It quashes the proceedings of the commission, which long before had directed the petitioner's discharge. Whatever rights the petitioner had thereafter to be assigned to duty, or to be paid, were not involved and could not be determined in the certiorari proceeding nor in the contempt proceeding. No facts are alleged in the petition showing that the civil service commission failed in any manner whatever to comply with the judgment of December 29, 1925, and the facts which are alleged do not show that the commission has any duty to perform in order to effect the reinstatement of the petitioner. If any such duty were shown, its performance might be compelled by mandamus, perhaps, but not by contempt proceedings.

For the reasons stated, the judgment of commitment is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

245 - 31065

THOMAS F. CRONIN,
Appellee,

v.

THE CIVIL SERVICE COMMISSIONERS OF THE CITY OF CHICAGO et al.,
Appellants.

243 I.A. 625

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In April, 1922, appellee filed, in the Superior court, his petition for a writ of certiorari against the civil service commission of the city of Chicago and its three commissioners and secretary.

The petition alleged that appellee was appointed captain of police in April, 1912, and continued to hold that position until November 21, 1919, when he was discharged, after being found guilty of neglect of duty, incompetency and inefficiency, on charges filed by the general superintendent of police; that similar charges were made at the same time against three sergeants of police and a patrolman, who were under appellee's command as police captain, and that the commission heard the charges against them at or about the same time it heard the charges against appellee; that the guilt or innocence of appellee depended upon the proof of the charges against the three sergeants and the patrolman, but that the commission made no finding on the charges against them until October 13, 1921, and then found them not guilty; that the commission wilfully withheld such finding for the purpose of concealing the facts from appellee and depriving

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him of his "statutory right for a rehearing or a review of the proceedings against him." The petition also alleged generally that the proceedings before the civil service commission were "illegal, irregular and not in accordance with the law."

Upon this petition, a writ of certiorari was issued on April 18, 1922. The respondents entered their appearance, and on May 6, 1922, filed a written motion to quash the writ, upon the ground, with others, that the petitioner had waited two and one-half years after his discharge before filing his petition, and was therefore guilty of laches.

So far as the record shows, no further proceedings were had in the Superior court until October 26, 1925, when there was a hearing on the motion to quash and the petitioner was given leave to file an amended petition instanter. The amended petition added two paragraphs, alleging that the electors of the city of Chicago had adopted the provisions of the Civil Service Act of March 20, 1895, that the petitioner and respondents were acting under it, and that the position of captain of police was an office created and classified by the civil service commission. The amended petition also added the names of the members of the civil service commission and secretary who were then in office, being the present appellants. Thereupon, the motion to quash the writ was denied and respondents were given ten days to file a return to the writ, which was done on October 29, 1925.

The return states that written charges were preferred against appellee in October, 1919, that a notice of a hearing thereon was given to him, that at the time specified in the notice, the commission heard the testimony of witnesses as to such charges and caused its finding, sustaining the charges and

ordering the discharge of the petitioner, to be entered of record. To this statement is appended the record of such charges, notices and findings, set forth verbatim.

On October 30, 1925, another motion to quash the writ was filed, and on December 15, 1925, an order was entered, on motion of petitioner, giving leave to file instanter another amendment to the petition, which respondents were ruled to answer within ten days. The amendment then filed states that "no legal evidence was presented, had or taken against your petitioner in connection with the alleged charges of violating the civil service rules hereinabove set forth," that petitioner was discharged "for political reasons only," and that the action of the commission "was malicious, capricious, and actuated only by political expediency."

The record recites that on December 29, 1925, the cause came on for hearing on the motion of petitioner to quash the record of the commission and the motion of the respondents to quash the writ, whereupon the court "having carefully inspected said record and permitted and heard testimony respecting the truth of the allegations contained in the petition with reference to the petitioner's discharge for political reasons, and it appearing to the court from said testimony that no evidence was introduced or presented before said Civil Service Commissioners sustaining the charges presented against said petitioner before said Commissioners, (and) the court doth find that petitioner was discharged for political reasons, as alleged in the petition and as amended herein," and "does now sustain" petitioner's motion, and overrule respondents' motion, whereupon the court ordered the record of the commission discharging the petitioner, quashed. The respondents appeal and assign errors in

hearing evidence outside of the record of the commission, and in overruling respondents' motion to quash the writ and entering judgment in favor of the petitioner.

It has been held repeatedly that the only office of the common law writ of certiorari is to bring before the court the record of the proceedings of an inferior tribunal for inspection, and that the trial upon a return made in obedience to such a writ is upon the record, alone, as disclosed by the return, and not upon any allegation of the petition nor any issue of fact relative to questions involved or heard upon the original trial. (Cass v. Dunoon, 260 Ill. 228, 230; Kamann v. City of Chicago, 222 Ill. 63; Joyce v. City of Chicago, 216 Ill. 466; Funkhouser v. Coffin et al., 301 Ill. 267.) It is clear, therefore, that the court erred in hearing the testimony of the petitioner and in making any finding or entering any judgment based thereon.

However, there is a more vital defect in the proceedings. The statement we have made of the facts demonstrates, we think, that the petitioner was guilty of laches, both in filing his petition originally, and in prosecuting his suit after the petition was filed. In The People v. Burdette, 285 Ill. 48, it was held that a writ of certiorari is not a writ of right, and whether it should be issued is, in a large measure, discretionary with the court, that the court's discretion is not arbitrary but should be based on reasons of sound public policy, and that an unexplained delay, for more than six months, in filing a petition for a writ of certiorari to quash the proceedings of the civil service commission discharging the petitioner from office, is such laches as warrants a denial of the petition. In the same case,

it was also held that such a writ may be quashed for failure to prosecute it with diligence after the return is filed, citing cases to that effect. The Burdette case cites, in support of its decision, the cases of City of Chicago v. Condell, 224 Ill. 595, and Blake v. Lindblom, 225 Ill. 555, both of which were cases where a police patrolman had been discharged after a trial by the civil service commission. In the Condell case, supra, the court said: "Where a detriment or inconvenience to the public will ensue, a party is required to act speedily in making his application and any unreasonable delay will warrant the refusal of the writ." In the Burdette case, it was said: "In addition to what was said by this court in those cases as to the detriment or inconvenience to the public which might ensue, it might be said that the position from which the petitioner was removed may have been filled by another to whom the salary has been paid, and therefore proceedings of this kind should be promptly presented and summarily decided." See also the opinion filed by this division of this court, on December 8, 1925, in case No. 30131, Cox v. Finn et al.

We think it must be apparent from the statement we have made of the contents of the petition and amended petition that the delay in this case was wholly unexplained. The rule announced by the Supreme court, therefore, must prevail in this case, and the judgment is accordingly reversed, the writ quashed and the petition dismissed.

JUDGMENT REVERSED.

Gridley, P. J., and Barnes, J., concur.

254 - 31074

JOSEPH GAUDIETZ,
Appellee,

v.

IGNATIUS J. BULGER,
Appellant.

243 I.A. 625
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In this case, at the close of all the evidence in a trial before a jury in an action for the balance alleged to be due on a building contract, the court directed a verdict for the plaintiff. This action is assigned as error.

The contract was for the erection of a brick bungalow, to be completed according to plans and specifications. One of the specifications requires the work to be guaranteed in writing for a term of five years. Others provide for cross-bridging for joists and bearing partitions, for valves on the water pipes, for a mosaic floor in the vestibule and an oak door to it, and for a shower in the bathroom. The contract price was $6500, all of which except $166.50 was paid. This suit was to recover that balance. The plaintiff, on direct examination, testified that he completely finished his work according to the specifications, but on cross-examination he admitted that he did not furnish any written guaranty to defendant, that he did not know whether a shower was put in the bathroom, and that he did not put any bridging between the joists, as provided for in the specifications. Defendant's evidence tended to prove that the floor put in the vestibule was oak instead of mosaic, that there was no door, but

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a mere opening, between the vestibule and the living room, that no shower was installed in the bathroom, that no bridging was placed between the joists and they were "buckling" as a consequence, and that nine water-pipe valves were missing. Defendant attempted to prove that the cost of putting in the bridging was more than the balance claimed to be due, but the court sustained objections to the testimony.

In Keeler v. Kerr, 157 Ill. 57, which was a suit brought to recover a balance alleged to be due for constructing a dock, it was held that where it appears that the contractor, in good faith and without any "willful departure from the terms of the contract, or omission in essential points," has substantially complied with the specifications, he will not be held to have forfeited his right to remuneration merely by reason of "slight defects caused by inadvertence or unintentional omissions," but may nevertheless recover "the contract price, less the amount, by way of damages, requisite to indemnify the owner for the expense of conforming the work to that for which he contracted." In Peterson v. Pusey, 237 Ill. 204, it was said that the rule laid down in the Keeler case, supra, "has been so repeatedly sanctioned by this court that it must now be held to be the settled law of this state."

Under the rule stated, it was for the jury to determine whether the contractor was guilty of bad faith, or wilful departure in essential particulars from the terms of the contract, and whether the defects shown were "slight defects, caused by inadvertence or unintentional omissions;" and since the evidence upon these questions is contradictory, it was error to direct a verdict for the plaintiff.

As the defendant undertook to prove the cost of putting

in the omitted bridging, we see no reason why he should not have been permitted to do so.

Complaint is also made of unfair and "flippant" remarks made by the trial judge during the trial. We are constrained to say that there is considerable basis in the record for the complaint, but, as the case must be tried again before another judge, it will be unnecessary for us to further notice appellant's contentions on this point.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

275 - 31095

THOMAS E. PATTERSON,
Appellant,

v.

NICHOLAS R. FINK et al.,
Appellees.

243 I.A. 625

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court quashing a writ of certiorari. The writ was issued to bring before the court the record of the proceedings of the civil service commission of the city of Chicago relating to the trial and discharge of appellant from his employment with the city.

It is contended that the civil service commission exceeded its jurisdiction, that the evidence shows the charges "were trumped up for the express purpose of ousting appellant, not in accordance with, but in spite of, the provisions of the Civil Service Law," that there is no evidence reasonably tending to support the charges, and that the appointing officer was guilty of laches in not filing charges within six months of the time of the offense.

For six years prior to February 10, 1925, appellant held a position, in the classified service if the city, as assistant chief operating engineer at one of the pumping stations in the city. On that day, as the result of a trial before the commission, he was found guilty of neglect of duty and insubordination, and ordered discharged. Later in the same year, on his amended petition, a writ of certiorari was issued.

2431.A 625

The return of the commission to the writ contains a full transcript of the record of its proceedings relating to appellant's discharge. It shows that formal charges of neglect of duty and insubordination, accompanied by a detailed specification of alleged facts relied on to sustain the same, were filed with the commission by the city engineer; that a copy of such charges, accompanied by a notice of the time and place set for the hearing of the same, was served on appellant, and he accepted service in writing; that he appeared at the hearing in person and by counsel and was present throughout the trial and participated in the examination of witnesses; that the testimony of the witnesses was transcribed and is attached to the return; that at the conclusion of the hearing the commission found appellant guilty as above stated, and specified five different instances of neglect of duty and insubordination, which facts so found substantially agree with the detailed specifications in the statement of charges preferred. Under the authorities, this is a sufficient showing of the jurisdictional facts necessary to sustain the finding and decision of the commission. (Funkhouser v. Coffin, 301 Ill. 257; Kammann v. City of Chicago, 222 Ill. 63; Joyce v. City of Chicago, 216 Ill. 466; The People ex rel. v. Lindblom, 182 Ill 241; Hamilton v. Town of Harwood, 113 Ill. 154.) We see nothing in the return to show that the charges were "trumped up." The finding of the commission was to the effect that the proof showed that the charges were true.

Whether there was any evidence before the commission reasonably tending to support the charges is a question the court may consider, but it must be determined from an inspection of the record alone, which must show affirmatively the facts upon which the exercise of jurisdiction by the commission depends. (Troxell v. Dick, 216 Ill. 98; Funkhouser v. Coffin, supra; Barton v.

Hoyt, 237 Ill. App. 626.) We find from the return, that the record of the commission shows affirmatively that there was evidence tending to sustain the charges. The weight of the evidence, and the credibility of witnesses, are matters which the Circuit court had no power to consider. (Joyce v. City of Chicago, supra; Cox v. Finn, Ill. App. No. 30131.)

As to the alleged laches, we know of no statute or authority which requires charges to be filed against a negligent or incompetent employee within six months of the time of the alleged offense. We think there is no analogy, such as is claimed by appellant's counsel, between such cases as this and cases in which an employee who has been discharged from the service of the city fails for more than six months to apply for a writ of certiorari.

It is finally insisted that the record of the commission as certified to the Circuit court was not in the record of the commission until after the writ of certiorari was served upon it. There is no competent proof in the record that such is the fact. There appears in the transcript an affidavit made by appellant's attorney that on May 14, 1925, he went to the office of the commission for the purpose of examining its record; that he was given the testimony taken, and, after reading the same, he asked for the findings and decision; that he was shown an entry in the minutes of the commission to the effect that appellant had been ordered discharged for neglect of duty, followed by a stated document number; that he then asked to see the document so numbered, "and was told by the president and secretary it had not been dictated and drawn up." As to this, it is probably sufficient to say that a record certified by the secretary of the commission cannot be contradicted or impeached by an affidavit of that sort.

But if it could be so attacked, the discrepancy in this case, if any, is immaterial, for the reason that the return contains a full transcript of the evidence taken at the hearing. In Funkhouser v. Coffin, supra, the court quoted, with approval, the following from 5 Ruling Case Law, 265; "Where the jurisdictional facts do not appear of record, the lower court must certify not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question as to the jurisdiction of the tribunal may be involved." If, therefore, the findings of specific instances of neglect of duty were not in the record at the time counsel made his examination, the evidence of such facts was there, and that was sufficient, under the authorities cited. (See also Buttimer v. Geary, 229 Ill. App. 524.)

For the reasons stated, the judgment is affirmed.

AFFIRMED.

Bridley, P. J., and Barnes, J., concur.

284 - 31104

M. A. FREHAN, doing business as the GORMAN SHOE COMPANY, a corporation,
Appellee,

v.

THE GROSSMAN SHOE COMPANY, a corporation,
Appellant.

243 I.A. 626
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $1891 rendered against it after a jury trial in an action brought to recover the contract price of 905 pairs of shoes sold and delivered and also for damages occasioned by the refusal of the defendant to accept 1297 other pairs of shoes included in the same contract.

Plaintiff is a manufacturer of shoes at Haverhill, Massachusetts. Defendant operates a number of retail shoe stores in Chicago. In September, 1922, defendant gave plaintiff an order for 2232 pairs of "opera pumps" of specified styles, sizes and widths, and of specified materials, at the contract price of $3.50 a pair, to be manufactured and shipped to defendant by express. A shipment of 905 pairs was made in the latter part of October, 1922. A few days later, defendant telegraphed to plaintiff that it had received the shoes and placed them on sale; that "the vamps are made so long that they choke in the instep," that "it is impossible to sell them," and "please do not send any more." This was followed, on November 4, by a letter saying: "After giving your pumps a thorough trial, we find that nine out of ten feet we cannot fit. Kindly let us know what disposition we should make of these shoes." Receiving no reply, defendant

shipped back to plaintiff, by express, on November 8th and 9th, 844 pairs, including one carton, containing 16 pairs of "damaged" shoes, and one wooden case, containing 23 pairs that "do not fit." Sixty-one pairs were not returned. On November 13th plaintiff wrote that after trying the shoes "on a dozen different women with different types and sizes of feet, high and low arch, slim and fat feet," and finding that they were "as nearly perfect as you can find for twelve types of feet," plaintiff had refused to receive the shoes so returned. To this defendant replied on November 16th, that the "Style of shoe could not be beat. If shoes fitted, would have been pleased with them. We will not, under any condition, take these shoes and they will be left wherever they are at your risk."

The shoes so returned remained in the express office in Haverhill until the following April, when they and the 1297 other pairs, which had been manufactured on defendant's order and were still in plaintiff's factory undelivered because of defendant's refusal to accept them, were sold by the plaintiff to a shoe dealer in Haverhill for $1.50 a pair. Plaintiff testified that there was no market for such pumps at that time and that they were sold for the best price she could obtain after making repeated efforts to sell them.

This suit was originally brought in the name of "German Shoe Company" as plaintiff, and by leave of court in August, 1925, the plaintiff's name was changed to "M. A. Feehan, doing business as the German Shoe Company." Defendant contends that the Statute of Amendments does not permit "the substitution of plaintiffs" in this way. The contrary has repeatedly been held. In Kanawha Dispatch v. Fish, 219 Ill. 236, 241, it is said: "Under our

liberal Statute of Amendments there may be an entire change of plaintiffs where necessary." Section 39 of the Practice act permits any amendment, "either in form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought." (See, also, Redlowski v. Grossfeld & Roe Co., 192 Ill. App. 534, and the cases there cited.)

It is next claimed that the court erred in admitting certain entries made in the plaintiff's books in due course of business. The only objection made to such entries as evidence is that it was not shown that the entries were made by a person who is dead or a non-resident of the state. The proof shows that the entries were made by the plaintiff's bookkeeper, who lived in Haverhill, Massachusetts, at the time of the trial. The objection was properly overruled.

It is urged that it was error to permit the plaintiff to try on a pair of the shoes in the presence of the jury. Appellant's objection to this sort of evidence seems to be an objection to its weight, and not to its competency. We must assume that all that is said in the brief regarding the weight of this evidence was urged before the jury upon the trial. The admission of such evidence is ordinarily in the discretion of the court, and there is no error unless such discretion has been abused. (Zipkie v. City of Chicago, 117 Ill. App. 418, 426.) There is no showing here of any such abuse.

Objection was made to the testimony of the witness Patterson upon the ground that he assumed to give an opinion as to the proper construction of a shoe while admitting that he was not a shoe manufacturer, but a shoe last manufacturer. Patterson testified as to the correct measurements of a last

proper for a model 4-B shoe, that the shoe tried on by the plaintiff in the presence of the jury was a 4-B, and that she and another witness, Miss Rooney, had feet of that size. He also testified that there was "no call for pumps between 1920 and 1924." We think there was no error in denying the motion of defendant to exclude the evidence of Patterson.

Most of the remaining contentions of appellant are addressed to one or the other of the propositions that appellant's motions for a directed verdict at the close of the plaintiff's evidence, and at the close of all of the evidence, should have been sustained, or that a verdict should have been directed against the plaintiff on the plea of set-off, or that the verdict is manifestly against the weight of the evidence. The set-off filed by defendant is based entirely upon the theory that defendant was justified in returning the shoes it received and in refusing to receive the remainder; so that if a verdict for the plaintiff upon that issue was proper, there could be no recovery on the set-off. There was certainly sufficient evidence, prima facie, in support of plaintiff's claim to entitle it to go to the jury, and this leaves only the contention that the verdict is manifestly contrary to the weight of the evidence. We have read and carefully considered the arguments of counsel on this point, and after reading the abstract, we think it is enough to say that we are unable to find that the verdict is against the weight of the evidence. While the record shows that defendant's action, in returning the shoes delivered and refusing to accept the remainder, was induced by complaints of a few customers regarding the fit of some of the very few pairs that were sold, yet the record also shows that the shoes were manufactured according to the specifications agreed upon between defendant and the salesman for the plaintiff;

and if any of them failed to fit, the jury may well have concluded the fault was that of defendant, in fitting its customers out of the large number of sizes and widths specified, rather than that of the plaintiff in manufacturing the shoes.

It is finally urged that the measure of damages adopted was wrong, and that it was the duty of the plaintiff to minimize the damages. It is contended that the correct measure of damages for the wrongful refusal to accept the shoes is the difference between the contract price and the fair market value of the shoes at the time of such refusal. Conceding this to be true, there was testimony that the shoes had no market value at that time. Plaintiff testified that she tried repeatedly to sell them, but was unable to find a purchaser other than a dealer who handles shoes that are ordinarily unmarketable, to whom she finally sold them. In so doing, plaintiff followed the rule which requires a party damaged by a breach of contract to do all that is reasonable to reduce the damage to the smallest amount.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

123 - 29535

JACOB FRANK,
Appellant,
vs.
THOMAS T. HOSKINS COMPANY,
Appellee.

243 I.A. 626

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Jacob Frank, from a judgment in the sum of $614.75 in favor of the plaintiff in an action brought by the plaintiff on two promissory notes totalling $2400, executed by the defendant and payable to the plaintiff. The case was tried before the court without a jury.

One note dated November 10, 1920, and due 30 days after date, was for $1000; the other note, dated September 5, 1922, due 90 days after date, was for $1400. The evidence shows that $900 was paid by the defendant on the $1400, leaving a balance due of $500. The defendant does not deny that the balance is due to the plaintiff on the $1400 note, but the defendant alleges that the $1000 note has been paid.

According to the well established rule payment is an affirmative defense, and the burden of proving payment is on the defendant. Ross v. Skinner, 107 Ill. App. 579, 581; 30 Cyc, pp. 1253, 1254.

The only question to be determined is whether the defendant has shown by a preponderance of the evidence that the note for $1000 was paid.

The plaintiff was engaged in the saloon business and his place of business was located at the northeast corner of Clark and Illinois streets, in the City of Chicago. The defendant company was engaged in the automobile repair business, and

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its place of business was located on Illinois street, a few doors east of Clark street. During several years the plaintiff had lent the defendant money and had cashed the pay checks of the employees of the defendant. On many occasions the checks of the defendant would return marked not sufficient funds, and the plaintiff would go to the defendant and receive an amount sufficient to cover the checks. At times the plaintiff exchanged checks with the defendant as an accommodation to the defendant. Thomas T. Hoskins, president of the defendant company, testified on behalf of the defendant, that the plaintiff had helped him a good many times; that the plaintiff used to cash payroll checks frequently, and when they were returned marked not sufficient funds, the plaintiff would carry them sometimes two or three days. The account with the plaintiff was kept on the books of the defendant under the name of "accommodation account."

To support the plea of payment of the note for $1000 the defendant offered ten checks amounting to $1084.33, which the defendant claimed were given to the plaintiff in payment of the note. The $84.33, according to the testimony of Hoskins, covered the interest on the note. On none of the checks was there any notation or memorandum showing that the checks were to be applied on the payment of the note; and there was no endorsement on the note of any payments whatever. The note was never delivered to the defendant, and Hoskins testified that he never asked the plaintiff to deliver the note to the defendant. The note was in the possession of the plaintiff at the time of the trial, and was introduced in evidence by the plaintiff. Oswald E. Winzer, a public accountant, who testified on behalf of the defendant, stated that the note did not appear on the books of the defendant. Albert F. Bauer, who was formerly an employee of the defendant, testified on behalf of the plaintiff that the note was entered on the books of the defendant in the accommodation

account.

Bauer also testified that he talked to the plaintiff about the note and that he told the plaintiff "things will soon be in shape to take care of that." Bauer further testified that on one occasion he asked Hoskins if he still owed the plaintiff the note for $1000; and that Hoskins said, "Well, I know we will take care of it some day."

The books of the defendant were not produced on the trial. Hoskins testified that they were burned in a fire that occurred in the basement of the premises occupied by the defendant.

The plaintiff testified that the checks, which the defendant claims were given to the plaintiff in payment of the note, were in fact given to the plaintiff to cover checks of the defendant which had been cashed by the plaintiff, and which had been returned by the bank marked not sufficient funds. The plaintiff further testified that in November or December, 1922, he called up Hoskins and asked him to settle with him on the last loan, namely the note for $1400; that he, the plaintiff, sent Hoskins a statement of his, the plaintiff's, account with the defendant, and that there appeared on that statement the following notation, "balance on the last note, $500, radio 75."

Hoskins' wife and an employee of the defendant testified on behalf of the defendant that they saw the statement and that the notation was "balance of loan $500; one radio set $75." The defendant failed to produce the statement. Hoskins said a search for it had been made, but that it could not be found.

T. M. Reiter testified that he became connected with the defendant company in July, 1923, through a loan of $10,000 he made that company; that prior to that time, namely, in January, 1923, he had the books of the company audited by a certified

public accountant; that he went to see the plaintiff, showed the plaintiff a balance of $1400 due to the plaintiff, asked the plaintiff if that was all that was due him, and that the plaintiff said "Yes." On cross-examination Reiter stated that he went to see the plaintiff in November,1922, and had a conversation with him similar to the one testified to on direct examination. The plaintiff testified that he never had any such conversations with Reiter; that he met Reiter for the first time about a month before the trial.

When the note for $1400 was given to the plaintiff, he asked for security and the defendant gave the plaintiff some stock as collateral security. The plaintiff testified that when this loan for $1400 was negotiated Hoskins said to the plaintiff, "That makes $2400 I owe you." Hoskins denied that he made any such statement.

We are of the opinion that the defendant has not proved by a preponderance of the evidence that the note for $1000 was paid. We have reached this conclusion from a consideration of the undisputed facts without attempting to reconcile the conflicting parts of the testimony.

The manner in which the payment of the note is alleged to have been made is opposed to customary conduct in such transactions. There was no notation on the checks which the defendant claims were given in payment of the note, to connect them with such payment. No endorsement of any payments were made on the note; and the note was never marked paid. Furthermore,the note was never delivered to the defendant, but remained in the possession of the plaintiff. Another fact which raises a serious doubt as to the payment of the note is that when the loan of $1400 was made by the plaintiff to the defendant, the plaintiff required the defendant to give him collateral security. The plaintiff had never asked for security in any of the other loans that he had made to the defendant, and the fact that he

demanded security when the $1400 loan was made would tend to support the inference that the $1000 note was unpaid.

The testimony of Reiter concerning the alleged conversations he had with the plaintiff in regard to the note of $1400 is wholly improbable. If, as Reiter states, the books of the defendant showed that the note of $1400 was the only indebtedness to the plaintiff, why should Reiter question the plaintiff about the correctness of the item? And why should Reiter inquire of the plaintiff specifically if that "was all" that was due to the plaintiff? The plaintiff denies that he ever had any such conversations with Reiter, and states that he did not know Reiter until about a month before the trial. But aside from the plaintiff's denial, the testimony of Reiter is inherently improbable.

Counsel for the plaintiff contends that the plaintiff is entitled to recover reasonable attorney's fees. The only testimony in regard to attorney's fees was given by Harry J. Guyon on behalf of the defendant. He testified that ten per cent of the amount of a note would be a reasonable, customary fee. The two notes provided for attorney's fees of ten per cent. On this basis the attorney's fee for the $1000 note would be $100; and for the $500 balance on the $1400 note would be $50. The note for $1000 provided for interest at the rate of 7 per cent and the note for $1400 for 6 per cent. At this rate of interest the amount of interest due on the $1000 note from the date of the note, namely, November 10, 1920, to the date of the judgment entered here, namely, December 27, 1926, would be $429.14; and the amount due on the $500 balance on the $1400 note from January 6, 1923, the date of the last payment on the note, to the date of the judgment entered here would be $119.35.

For the reasons stated in the opinion the judgment of the trial court is reversed with a finding of facts, and judgment in favor of the plaintiff will be entered here in the sum of $2198.39.

REVERSED WITH FINDING OF FACTS

AND JUDGMENT HERE.

McSurely, P. J., and Matchett, J., concur.

125 - 29535 FINDING OF FACTS.

We find as facts that the defendant is indebted to the plaintiff for a balance of $500 on the note for $1400, together with interest on the $500 at the rate of six per cent from January 6, 1923, to December 27, 1926; the said amount of $500 plus the interest being $619.25; that the defendant also is indebted to the plaintiff for the full amount of the note for $1000, together with interest thereon at seven per cent from November 10, 1920, to December 27, 1926; the said amount $1000 plus the interest being $1429.14; that the defendant also is indebted to the plaintiff in the sum of $150 for attorney's fees.

129 - 30948

ALBERT PICK & COMPANY,
Appellee,

v.

RELTIG BUILDING CORPORATION,
Appellant.

243 I.A. 626

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a replevin suit brought by the plaintiff, Albert Pick & Company, a corporation, against the defendant, Reltig Building Corporation, in the Municipal Court, on May 11, 1925. It was claimed by the plaintiff that it sold to the defendant certain items of personal property for the equipment of a barber shop and manicure department, for $2964.40; that the property was delivered to and received by the defendant; that the defendant failed in the payment of the purchase price; that the title to the property remained in the plaintiff; that upon breach of payment, a demand was made by the plaintiff upon the defendant for the return of the property, which was refused, and that it, the plaintiff, was, therefore, entitled to a judgment for the return of the property.

On the other hand, it was claimed by the defendant that it had title to the merchandise and the right to its possession, and by the terms of the contract, the plaintiff could either require of the defendant notes and a chattel mortgage in payment of the alleged indebtedness, or, at its

ALBERT PICK & COMPANY,

Appellee,

v.

METRIC BUILDING CORPORATION,

Appellant.

2431.A. 626

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 29, 1938.

MR. PRESIDING JUSTICE MATAS delivered the opinion of the court.

This is a replevin suit brought by the plaintiff, Albert Pick & Company, a corporation, against the defendant, Metric Building Corporation, in the municipal Court, on May 11, 1938. It was claimed by the plaintiff that it sold to the defendant certain items of personal property for the equipment of a barber shop and manicure department, for ($2004.80); that the property was delivered to and received by the defendant; that the defendant failed in the payment of the purchase price; that the title to the property remained in the plaintiff; that upon passon of payment, a demand was made by the plaintiff upon the defendant for the return of the property, which was refused, and that it, the plaintiff, was therefore, entitled to a judgment for the return of the property.

In the other hand, it was claimed by the defendant that it had title to the merchandise and the right to its possession, and by the terms of the contract, the plaintiff could either require of the defendant make out a mutual

option, require a conditional sales contract, but that the plaintiff did not require a chattel mortgage and notes, and as a result, the defendant was not in default in its failure to execute notes and a chattel mortgage; that the plaintiff has not complied with the provisions of the contract, in regard to the delivery of the merchandise, and failed to install it as it contracted to do; and that the defendant has made payments as required of it by the terms of the contract.

There was a trial before the court, without a jury; and a finding that the right to possession was in the plaintiff; that the plaintiff's damages for wrongful detention were one cent; and judgment was entered thereon. This appeal is from that judgment.

On September 12, 1924, the defendant, which conducted the Southmoor Hotel, being desirous of certain equipment for a barber shop and manicure department, entered into a written contract with the plaintiff for the purchase of twenty-five different items of personal property. A description of the items is set forth in certain typewritten specifications which are attached to the contract. The contract is made out on a printed form, containing a number of blank spaces. As it appears in the record, it is a somewhat inartistic document. According to the beginning of the contract, the Southmoor Hotel is the Buyer, whereas it is quite obvious when the signatures are reached, that it is the Reltig Building Corporation that is the purchaser. In form, it is a proposition by the plaintiff, which is partly in print, partly in typewriting and partly in script, to sell certain merchandise described in attached specifications, to the defendant, the buyer, and it is not

specifications, the defendant, the buyer, and it is not
sealed, to sell certain merchandise described in attached
the plaintiff, which is partly printed and partly in
print, partly
signatures are typed, that it is the Reilly Building Corpora-
tion that is the borrower. In fact, it is a composite of
most in the buyer, whereas it is quite obvious when the
pointing to the beginning of the contract, the borrower
it appears in the record. It is a somewhat illustrative document,
on a printed form, containing a number of blank spaces. As
which are attached to the contract. The contract is made out
the items in set forth in certain typewritten specifications
five different items of personal property. A description of
written contract with the plaintiff for the purchase of insur-
for a motor body and maintenance department, entered into a
ducted the Northwestern Hotel, being desirous of certain equipment
cent; and ledgers was entered thereon. This appeal is from
that judgment.

On September 13, 1924, the defendant, which con-

and a finding that the right to possession was in the plaintiff;
that the plaintiff's damages for wrongful detention were one

There was a trial before the court, without a jury;

payments as required of it by the terms of the contract;
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pies not complied with the provisions of the contract, in re-
to secure notes and a chattel mortgage; that the plaintiff
as a result, the defendant was not in default in the failure
plaintiff did not require a chattel mortgage and notes, and
option, require a conditional sales contract, but that the

disputed that the defendant accepted the proposition and became the buyer. The first paragraph is as follows:

> "Albert Pick & Company (herein called the Seller) hereby proposes to sell and to ship to the Buyer, the merchandise in the attached specifications at the price of $2,350.00, (subject to the itemization given therein, and to such minor adjustments as may take place from time to time at the unit prices set forth.)
> Delivery date is to be October 1st, 1924. Payable one-third cash - balance in 12 equal payments. $785.00 cash on signing contract, 11 (eleven) notes of $100.00 each and one note at $365.00."

The last sentence is in script. The rest of the contract is in print. The printed paragraph on terms is as follows:

> "Cash upon signing hereof $_____: before delivery to Buyer of the first shipment of said merchandise $_____ the balance shall be evidenced by _____notes, in the form adopted and used by the Seller, of the Buyer bearing date of such first shipment payable monthly; the first note to mature one month after date and the following notes one month apart, all bearing interest at the rate of 7% per annum until paid, which notes shall be secured by a chattel mortgage or at the option of the Seller, by a conditional sales contract, upon said merchandise in the form or forms now used by the Seller. The Buyer agrees to execute, acknowledge and deliver such chattel mortgage or conditional sales contract and the notes to be secured thereby before delivery to the Buyer of such first shipment."

The contract provides certain conditions, among which is the following:

> "The title to said merchandise shall remain in the Seller until the making of said cash payments and the execution and delivery to the Seller of said notes, and of the chattel mortgage or conditional sales contract securing the same."

> "It is further agreed that said merchandise shall be considered as personal property, and at no time as a fixture, or as part of or as an appurtenance to any building or real estate, * * * and the Seller may remove such merchandise, either before or after installation, if the Buyer shall fail to carry out any of the provisions of this agreement."

Attached to the contract is a letter dated September 18, 1924, written by the defendant to the plaintiff, authorizing eighteen changes and additions, all of which are itemized, at an added expense of $840.07, and which states three items allowed to be omitted, which amount to $225.60, leaving a total net addition of $614.47, thus making the total cost price, $3964.47. There is no controversy as to the latter amount being correct.

The plaintiff proceeded to deliver and install the merchandise in question at the Southmoor Hotel, but from time to time some questions arose as to certain mirrors which were being put up in the barber shop, which was part of the premises being equipped.

The evidence of one Jeuck, sales engineer for the plaintiff, is that he signed the contract in question on September 12, 1924; that he saw the merchandise, which was specified in the contract and specifications, and the letter attached, in the building after it was delivered, and it consisted roughly of barber shop and manicure equipment; that in January, 1925, he saw Gittler, the president of the defendant company, at the Southmoor Hotel, where the equipment was; that he told him, the plaintiff had completed its part of the contract and wanted its money for the job in accordance with the terms of the contract; that Gittler said, "The equipment was not installed in accordance with his understanding of the thing; and we, meaning the plaintiff, changed the back part, or mirror case, once for him, and he was not satisfied and said he wanted something different, and we changed that again;" that he, the witness, supervised the

installation of the equipment to a certain extent, and saw the job after the equipment was installed; that the plaintiff made some changes in the fixtures; that after those were made, everything was in accordance with the revised contract. He further testified that when he was there at the hotel in January something was said about the fixtures not being complete, and he, the witness, said they were complete; that several times when he was out there, he gave Gittler a statement of the account; that when he called in January, 1925, there was due somewhere around $3100 or $3200, as the balance due on the contract in question after it was modified; that on January 14, 1925, the work was completed; that they made some changes in order to clear up the job. He further testified, "Gittler stated he was not satisfied with the job, said he wanted additional changes, regardless of the fact that the work was installed as ordered." He further testified that the job was completed prior to January, 1925, in accordance with the contract; that in the meantime he tried to collect the account.

Charles M. Parker, credit man for the plaintiff, testified that he saw Gittler repeatedly in connection with the plaintiff's account with the defendant; that the last time he saw him was the first week in May, 1925, when he had a conversation with him in regard to the payment of the account; that the last two or three times he called on him he made demand for payment of the balance due, or that the defendant execute a chattel mortgage, according to the contract; that Gittler refused to do either one; that Gittler said he

would not settle the account either by payment or by the execution of notes and mortgages; that there is due the plaintiff on this particular account $2100. He further testified that the defendant bought other merchandise from the plaintiff than that listed in the contract in question, and the plaintiff received money on that account, which was credited to the defendant. He further testified that there was considerable due on an open account from the defendant to the plaintiff on December 7, 1924; that the plaintiff sold the defendant considerable merchandise in 1924, in addition to the merchandise mentioned in the contract in question; that he could not say positively if anything was due on that account on December 8, 1924.

One Carlson, attorney representing the plaintiff, testified that he saw Gittler about a week before the replevin suit was begun; that he went to the office of the defendant in the Southmoor Hotel Building, and asked for Gittler; that the man there said his name was Smith; that he was a sort of manager of the hotel and company there; that he asked the man if Gittler, the President was in; that the man said, no, he had left a short time ago; that he asked Smith if Gittler was an officer of the Company, and Smith said, "I think not. I can take care of any matters you want handled;" that he, the witness, told him that he was there on behalf of the plaintiff; that Smith said he knew all about that, and wanted to know what he, the witness, wanted; that he, the witness, said, "I want something on the account;" that Smith then said, "I guess you won't get any;" that the witness then said, "Then I am here prepared with the necessary men and conveyances to remove the merchandise described in the contract;" that Smith then said, "You can't have it;" that he, the witness, waited quite a while for Mr. Gittler to come in, but that he did not

show up; that it was around one o'clock when he left with the men and the wagon; that Smith was there and in charge of the office; that that was about a week before the replevin action was started, but it may have been on the Saturday before; that demand was made one week and the replevin action started the next; that he may have talked over the telephone with the attorney for the defendant while he was out at the Southmoor Hotel on Saturday, May 9.

Gittler testified for the defendant that he was President, and owned most of the stock of the defendant company, which company owns the Southmoor Hotel; that the plaintiff installed fixtures in his place; that there were 6 or 8 temporary mirrors installed until other mirrors were ready; that the other mirrors were never installed; that he talked with Jeuck in November and December, 1924; and he said it takes two or three months at least in the factory; that they would be installed not later than March; that they never were installed. He further testified that checks for $100.00 which were given by the defendant on January 10, February 10, April 10 and March 10, 1925, were monthly payments for the merchandise mentioned in the contract in question, used in the barber shop and manicure department. He further testified that Mr. Pick, of the plaintiff company, on December 10, 1924, personally asked him for money on an account outside of the contract in question; that he told Pick if he would take off 3% he would give him a check; that a messenger brought the bill, and he, the witness, gave him a check dated December 6, 1924, for $3,172.05, paying off those accounts in full, which were outside of the

contract in question; that the amount of that account before the discount of 3%, was $3,270.15; that on the account here in question, which was $2964.00, the defendant had paid $1,488.00 - $988.00 and five checks of $100.00 each; that on one occasion he had a talk with Parker, the credit man of the plaintiff, and asked him if he had gotten all the equipment for the barber shop and manicure department; that he told him he was short of mirrors; that Parker then demanded the fixtures back; that he told Parker that he had paid for the fixtures, and Parker said, "If you don't give back the fixtures I will make a replevin;" that that was in May, 1925; that Parker said he wanted the fixtures because they had not been paid for; that he, the witness, told him he had paid for them, and if he owed anything to send him a statement, and referred him to his attorney; that the next morning some bailiff came out and took out the property; that Parker never asked him anything concerning a chattel mortgage or notes; that one Hayes, on one occasion asked him if he would give notes; that Parker said, "Mr. Gittler, I don't think I'll take your notes. I know you will never sign 7 per cent interest notes, you pay every month $100.00. That is enough;" that when Hayes came out, Parker, also, came out, and demanded money; that on Monday, May 9, he, Parker, came out with the bailiff; that as to the other account, he bought kitchen utensils in August; that he paid the open accounts in full on December 8; that he bought other merchandise around that time from the plaintiff; that he never agreed to pay $100.00 a month on that account.

In rebuttal, the witness Hayes, salesman for the plaintiff, testified that he had sold for the plaintiff to the

defendant about $40,000 worth of merchandise; that it was chiefly on a C.O.D. basis; that its credit was good; that he personally guaranteed payment on the silverware of $6,000.00; that they got that money; that certain kitchen utensils were sold to the defendant in July or August, 1934, for about $1400 or $1500; that Gittler, of the defendant company, agreed to pay $500, and gave him a check for that amount, and agreed to pay the balance in 12 months, at $100.00 a month; that the checks which were offered in evidence were in payment of the kitchen utensils contract; that he knows that to be true, because he went out with Parker, the credit man, to see Gittler, and got the order; that Gittler told him that the $100 a month was to apply on the kitchen utensils.

It is claimed for the defendant that the contract was not carried out; that the merchandise contracted for was not furnished. That is not tenable. The contract had some flexibility. It provided that minor adjustments might take place from time to time. The only serious complaint made by the defendant pertains to the subject of mirrors; and they were considered by both parties, and discussed, and efforts made by the plaintiff to make all reasonable changes it was thought were essential for the carrying out of the spirit and substance of the contract. Jeuck says he told Gittler, in January, 1935, that the plaintiff had completed its part of the contract and wanted its money for the job. Jeuck, also, explains that changes were twice made in order to suit Gittler, and says that he supervised the installation and that after the changes were made, everything was in accordance with the revised contract; that on January 14, 1934,

the work was completed.

It is true that Gittler testified that 6 or 8 temporary mirrors were installed and that the others were never put in. That, however, is mere contradiction, and as there are no discrepancies in the evidence that suggest that greater credence should be given to Gittler than to Jeuck, we do not feel justified in holding contrary to the finding of the learned trial judge, and especially in view of the fact, that there are a number of circumstances, minor, perhaps, in themselves, such for example, as repeated demands for payment, which corroborate the plaintiff's claim that the merchandise was all delivered.

It is claimed for the defendant that it was not in default on its payments. The evidence on that subject is irreconcilable, as shown above. In 1924 there were various accounts outstanding between the parties; seemingly, a general account, a kitchen utensil account and the one here in question. Gittler claimed that five payments of $100.00 each were made on the barber shop and manicure department account. Hayes, a salesman for the plaintiff, said that certain kitchen utensils were sold to the defendant in the summer of 1924 for $1400.00, or $1500.00, for which Gittler gave a check of $500.00 and agreed to pay the balance in 10 months at $100.00 a month; and that the checks in evidence were on that account. It is claimed that the latter evidence was stricken out. An examination of the record does not show that the witness' first answer on that subject was stricken out. But, even if it were, we think the testimony of Jeuck and Parker, the credit man, sufficiently prove that the defendant had not paid as the contract required and

was in default.

It is claimed that no demand was made before the goods were retaken under the replevin writ. That we think untenable. Parker's evidence is sufficient. It is urged for the defendant that if the plaintiff delivered all the merchandise, without first obtaining a chattel mortgage and notes, it must be considered as having waived the right. That does not seem to be sound. The contract provides that "The Buyer agrees to execute and acknowledge and deliver such chattel mortgage, or conditional sales contract, and the notes to be secured thereby, before delivery to the buyer of such first payment." Not having done so, the defendant was continuously in default after delivery began. The contract also provided that "the Seller may remove such merchandise * * * if the Buyer shall fail to carry out any of the provisions of this contract."

On the subject of whether or not an actual demand was made, Gittler testified that in a conversation with Parker, the credit man of the plaintiff, he, Gittler said, "he (Parker) demanded, he wants the fixtures back." * * If you don't give back the fixtures, I will make a replevin." We think the evidence sufficiently shows that a demand was made before the replevin suit was begun. Natl. Bond & Investment Co. v. Zakos, 230 Ill. App. 608.

It is urged that the trial judge erred in ruling adversely upon a question propounded by counsel for the defendant to plaintiff's witness Jeuck. Jeuck, when being cross-examined, was shown a letter dated January 19, 1925, addressed by the plaintiff to the defendant, and asked the

Co. v. Taylor, 252 Ill. App. 608.

meaning of a certain paragraph in that letter. Objection was made to the question, and the objection sustained. We think the ruling of the trial judge was correct. The paragraph referred to is simple, easily understood, and needed no interpretation as the result of an opinion by the witness as to what it meant when it was written.

For the foregoing reasons, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

141 - 30960

GEORGE J. COOKE COMPANY, a corporation,

Appellant,

v.

BERT SCHREIBER,

Appellees

243 I.A. 626

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On August 13, 1920, the plaintiff, George J. Cooke Company, a corporation, brought suit in the Municipal Court of Chicago, against the defendants, Schreiber Brothers Company, a corporation, and Bert Schreiber, on three promissory notes; one dated August 26, 1915 for $750.00, payable to the order of George J. Cooke Co.; one dated September 10, 1915, for $1146.25, payable four months after date, to the order of George J. Cooke Co., and one dated September 20, 1915, for $1664.13, payable four months after date to the order of George J. Cooke Co., all three notes being signed, "Schreiber Brothers Co. By N. H. Bolotin, Treas." and endorsed "Bert Schreiber."

On October 7, 1925, the suit was dismissedas to Schreiber Brothers Company. There was a trial before the court, with a jury, and a verdict finding the issues against the plaintiff, and a judgment that the plaintiff take nothing by its suit, and that the defendant have and recover from the plaintiff his costs. This appeal is from that judgment.

plaintiff's case. This appeal is from that judgment.

By its suit, and that the defendant have and recover from the plaintiff's case, with a jury, and a verdict finding the issues against the plaintiff, and a judgment that the plaintiff take nothing

Schreiber Brothers Company. There was a trial before the

On October 7, 1929, the suit was dismissed as to

R. M. Bulotin, Trees." and endorsed "Bert Schreiber."

all three notes being signed, "Schreiber Brothers Co. By four months after date to the order of George J. Doole Co.", and one dated September 30, 1929, for $1884.12, payable Co., payable four months after date, to the order of George J. Doole George J. Doole Co.; one dated September 10, 1929, for $1140.32, one dated August 30, 1929 for $750.00, payable to the order of a corporation, and Bert Schreiber, on three promissory notes; of Chicago, against the defendants, Schreiber Brothers Company, Company, a corporation, brought suit in the municipal Court

On August 13, 1930, the plaintiff, George J. Doole

opinion of the court.

MR. PRESIDING JUSTICE TAYLOR delivered the

Opinion filed Dec. 29, 1932.

Appellees

BERT SCHREIBER,

v.

Appellant,

SCHREIBER BROTHERS COMPANY,

a corporation.

2431A. 626

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

It is admitted that the notes in question were legally executed and delivered to the plaintiff.

To reverse the judgment, it is contended for the plaintiff, (1) that the notes were not endorsed by the defendant, Bert Schreiber, for the accommodation of the plaintiff; (2) that sufficient notice of dishonor of the notes was given to charge the endorser, and (3) that the court erred in regard to certain instructions.

The plaintiff was a corporation, organized in 1905, and was in the business of manufacturing and selling beer. The defendant, Schreiber Brothers Company, a corporation, was in the retail liquor business in 1915 and 1916, and had four saloons in Chicago. Prior to 1915 the business had been conducted by a brother of the defendant, Bert Schreiber, in the name of Schreiber Brothers Company, for a number of years. The defendant, Bert Schreiber, went into the Schreiber Brothers Company, a corporation, in 1914. He put in about $50,000 in cash in the early part of October of that year, receiving about one-third of the stock, and was made President. At that time, the concern had debts to the extent of about $100,000. Schreiber Brothers Company, a corporation, bought practically all of its beer for its four saloons from the plaintiff, dealing in from 500 to 600 barrels of beer a month. Part of the time, Bert Schreiber was treasurer, and during that time signed the notes of the corporation. In 1914, the books of account showed that Schreiber Brothers Company, a corporation, owed the plaintiff between $5,000 and $8,000. Bert Schreiber testified that he did not remember when he

It is admitted that the notes in question were legally executed and delivered to the plaintiff.

To reverse the judgment, it is contended for the plaintiff, (1) that the notes were not endorsed by the defendant, Bert Schreiber, for the accommodation of the plaintiff; (2) that sufficient notice of dishonor was given to charge the endorser, and (3) that the court erred in regard to certain instructions.

The plaintiff was a corporation, organized in 1908, and was in the business of manufacturing and selling beer. The defendant, Schreiber Brothers Company, a corporation, was in the retail liquor business in 1913 and 1914, and had four saloons in Chicago. Prior to 1913 the business had been conducted by a brother of the defendant, Bert Schreiber, in the name of Schreiber Brothers Company, for a number of years. The defendant, Bert Schreiber, went into the Schreiber Brothers Company, a corporation, in 1914. He put in about $80,000 in cash in the early part of October of that year, receiving about one-third of the stock, and was made President. At that time, the concern had debts to the extent of about $100,000. Schreiber Brothers Company, a corporation, bought practically all of its beer for its four saloons from the plaintiff, dealing in from 300 to 500 barrels of beer a month. Part of the time, Bert Schreiber was treasurer, and during that time signed the notes of the corporation. In 1914, the books of account showed that Schreiber Brothers Company, a corporation, owed the plaintiff between $8,000 and $9,000. Bert Schreiber testified that he did not remember when he

ceased to be treasurer; that while he was treasurer he signed several notes of the Schreiber Brothers Company; that later, upon additional capital being put into the corporation, he was let out, and one Bolotin was made treasurer, and he, Bert Schreiber, became manager of one of the saloons. Part of the $50,000 he put in when he became a stockholder in the company, he used in paying off certain notes of the plaintiff, and reducing the indebtedness of Schreiber Brothers Company to the plaintiff.

All three of the notes in question were given as renewal notes. Cooke, the president of the plaintiff corporation, testified that the notes which were renewed were originally for larger amounts, payments having been made on them; that as the old notes became due, new ones were taken, generally together with some payment; that some of the notes had run for four months, and some for thirty days; that the notes of September 10, and 20, 1915, were given for other notes which had been cancelled; that the note of August 26, was given for another note which had not yet become due, and which had been given for cash advanced; that the note of September 10 was the renewal of an old note that became due for money advanced a long time before, perhaps two or three years.

It is evidence of Bert Schreiber that the notes in question were handed to him by one Flannigan, who was an employe of the plaintiff, at the 12th Street saloon, two at one time, and one at another; that the name of Schreiber Brothers Company was on each of the notes, one or two days before he put his name on them as endorser; that Flannigan asked him to look them over, and sign them; that he told

caused to be transmitted that while he was transmitted be signed several notes of the Eohrsiber Brothers Company; that later, upon additional objection being put into the conversation, he was let out, and one Hofakin was made treasurer, and he, Burt Eohrsiber, became member of one of the defense. Part of the $50,000 to be put in when he became a stockholder in the company, he need in having all certain notes of the plaintiff, and reducing the indebtedness of Eohrsiber Brothers Company to the plaintiff.

All three of the notes in question were given on renewal notes. Deebe, the president of the plaintiff corporation, testified that the notes which were renewed were originally for larger amounts, payments having been made on them; that as the old notes become due, new ones were taken, generally together with some payment that none of the notes had run for four months, and some for thirty days; that the notes which were given for renewal of an old note that become due for money advanced a long time before, perhaps two or three years.

It is evidence of Burt Eohrsiber that the notes in question were handed to him by one Flannigan, who was an employe of the plaintiff, at the 13th Street saloon, and at one time, and one at another; that the name of Eohrsiber Brothers Company was on each of the notes, one or two days before he put his name on them as endorser; that Flannigan asked him to look them over, and also that he said

Flannigan that he was not the treasurer, that he was just a workman since the organization changed, but Flannigan said, "It seems when they brought the notes to the bank to discount them, the bank insisted upon having one of the Schreiber Brothers' signature on the notes and Flannigan asked me to sign them as an accommodation to Mr. Cooke so he could take them to the bank and discount them, and it was only after that that I signed them;" that he received nothing from Cooke for signing them; that he knew that those notes had been given by the Schreiber Brothers Company for old beer accounts; that he signed each of them several days after the dates of the notes; that he did not take the notes from the plaintiff's office and handany one of them to Cooke, or sign any one of them in Cooke's presence; that when Flannigan came with the notes, he Flannigan said he had been to the bank to discount the notes, and they sent them back and wanted the endorsement of one of the Schreiber Brothers on the notes; that Flannigan came to his , the witness's,saloon, pulled out the notes, and asked him to sign, that is, endorse them; that all the notes were signed in his saloon; that before he went in the Schreiber Brothers Company, he knew the company owed the plaintiff money for beer; that he never talked to Cooke about the three notes; that he was never at the plaintiff's office to sign any notes at any time; that he does not remember having been Cooke at any time since he, the witness, was with Schreiber Brothers Company, and never did business with him at all; that "I did perhaps talk to him over the telephone."

The evidence of Cooke, the President of the plaintiff company, is that the note of August 26 is in Flannigan's

The evidence of Doyle, the President of the plaintiff company, is that the note of August 26 in Flannigan's

not

Flannigan that he was the treasurer, that he was just at all; that I did perhaps talk to him over the telephone." Carpenter Brothers Company, and never did business with him having been Cooke so any time since he, the witness, was with office to sign any notes at any time; that he does not remember about the three notes; that he was never at the plaintiff's the plaintiff money for beer; that he never talked to Cooke in the Carpenter Brothers Company, he knew the company used all the notes were signed in his office; that before he went notes, and asked him to sign, that is, endorse them; that Flannigan came to him, the witness, talked out the indorsement of one of the Carpenter Brothers on the notes; that count the notes, and they went then back and wanted the ex- the notes, he Flannigan said he had been to the bank to dis- of them in Cooke's presence; that when Flannigan came with office and Mayberry was at them to Cooke, or sign any one notes; that he did not take the notes from the plaintiff's be signed each of them several days after the dates of the by the Carpenter Brothers Company for old beer accounts, that signing them; that he knew that these notes had been given that I signed them;" that he received nothing from Cooke for them to the bank and discount them, and it was only after that sign them as an accommodation to Mr. Cooke as he could take Brothers' signature on the notes and Flannigan asked me to count them, the bank insisted upon having one of the Carpenter a witness since the organization changed, but Flannigan said, "It seems when they brought the notes to the bank to dis-

handwriting, and the notes of September 10 and 20 are in his, Cooke's handwriting; that he received those notes, and after they were given, the plaintiff cancelled the other notes; that the new notes were endorsed the same way as the other notes; that the plaintiff returned all of the old notes, for which the new ones were renewals, to the Schreiber Brothers Company, with the exception of the note of July 25. That note was tendered at the trial, as it was stated that the note of August 26 was in payment of that note. He further testified that all of the three notes were given for cash advanced to Schreiber Brothers Company; that the cash for the note of August 26, 1915, was paid some time in the middle of 1914; that as to the note of September 10, the cash was loaned about a year before that date; that as to the note of September 20, the cash for that was loaned about a year before. He further testified that when the three notes were given, he was not alarmed about the financial condition of Schreiber Brothers Company, that he thought they were going to pull through, and that the plaintiff would get its money; that he insisted that Bert Schreiber sign the notes, because he had great confidence in his position in the beer business; that when Schreiber Brothers Company borrowed money, he always got Bert Schreiber's name on the paper, as he actually conducted the business of Schreiber Brothers Company; that Bert Schreiber called at his, Cooke's office a number of times.

Cooke further testified that after the note of August 26 became due, he talked with Bert Schreiber in his, Cooke's office, at which time two of the plaintiff's men, Flannigan and Cogan were present; that - at the time of trial - Flannigan was out of the country, and Cogan was dead; that on

Plaintiff was out of the country, and Cohen was dead; that on January and Cohen were present; that - at the time of trial - Cooke's office, at which time two of the plaintiff's men, January 29 became due, he united with Mest Carpenter in his, pawnbrokering, and the notes of September 10 and 20 are in his

qualified attorney. Cooke, a office a number of times.

partnership of Carpenter Brothers Company; that Mest Carpenter, Carpenter's name on the paper, as he actually conducted the Carpenter Brothers Company borrowed money, he always met Mest Clarence in his position in the pawn business; that when that Mest Carpenter sign the notes, because he put first com- and that the plaintiff would get its money; that he insisted Company, that he thought they were going to pull through, planned about the financial condition of Carpenter Brothers testified that when the three notes were given, he was not cause for that was loaned about a year before. He further before that date; that as to the note of September 20, the the note of September 10, the cash was loaned about a year 20, 1919, was paid some time in the middle of 1919; that as to Carpenter Brothers Company; that the cash for the note of August that all of the three notes were given for cash advanced to August 29 was in payment of that note. He further testified was tendered at the trial, as it was stated that the note of Company, with the exception of the note of July 29. That note which the new ones were renewals, to the Carpenter Brothers that the plaintiff returned all of the old notes, for notes; that the new notes were endorsed the same way as the other they were given, the plaintiff cancelled the other notes; Cooke's pawnbrokering that he received those notes, and after pawnbrokering, and the notes of September 10 and 20 are in his

that occasion Bert Schreiber told him that he was not very well off, but that some day he would be a rich man and pay it; that he also talked to Bert Schreiber about the second note, the one dated September 10, in his office; that he saw Bert Schreiber within a week or two weeks after the third note, dated September 20, became due, and he said that he had received a letter which Cooke had sent, but could not pay the note then, but would some day pay it; that he had a distinct recollection of seeing Bert Schreiber, and that he signed the notes in question; that Bert Schreiber brought the notes to the office and signed them; that when the note of September 10 was brought to the plaintiff's office, it was already signed by the defendant company; that he remembered Bert Schreiber endorsing the note of September 20; that Bert Schreiber told him a dozen times he would pay up, but was then in bad shape and wanted him, Cook, to start him up, to loan him money, and said in regard to the notes that some time he wouldhave the money and would pay up.

There was offered in evidence a check for $750.50, dated September 27, 1915, payable to the order of the plaintiff, signed Schreiber Brothers Company, by Bert Schreiber, treasurer, which was deposited in the bank, but returned, "Not sufficient funds;" also a check dated October 18, 1915, to the order of the plaintiff, $390.00, signed by Schreiber Brothers Company, by Bert Schreiber, which was given to Cooke by and which he, Cooke, was asked to hold until the 23rd of October; also a check dated October 4, 1915, for $908.00, signed Schreiber Brothers Company by Bert Schreiber, which was given to Cooke by him, on which no money was ever received.

received".

which was given to Cooke by him" on which no money was ever $5000.00" signed Barrel Brothers Company of Bent Barrels" $322 of October; also a check dated October 4, 1918" for Cooke by and which he" Cooke" was asked to pay until the Brothers Company" of Bent Barrels" which was given to to the order of the plaintiff" $5000.00" signed by Barrels "Not sufficient Funds;" also a check dated October 19, 1918" treasurer" which was deposited in the bank" but returned" tiff" signed Barrel Brothers Company" by Bent Barrels" dated September 27, 1918" payable to the order of the plain-

There was offered in evidence a check for $1500.00"

time he would have the money and would pay us".

loan him money" and said in regard to the notes that some them in pad shape and wanted him" Cook" to start him up" to Barrels Corporation" by Bent Barrels" but was Barrel Barrels endorsing the note of September 30" that Bent already signed by the defendant company" that he remembered of September 10 was brought to the plaintiff's office" it was the notes to the office and signed them" that when the note be signed the notes in question" that Bent Barrels brought a distinct recollection of seeing Bent Barrels" and that but the note then" but would come day day it" that he had received a letter which Cooke had sent" but could not dated September 30" because due" and he said that he Bent Barrels within a week or two weeks after the third note" the one dated September 10" in his office" that he can it" that he also talked to Bent Barrels about the second well off" but that some day he would be a rich man and not that someone Bent Barrels told him that he was not very

In the fall of 1915, an involuntary petition in bankruptcy was filed against Schreiber Brothers Company, and subsequently it was adjudicated a bankrupt. In those proceedings, the plaintiff filed two claims, one for $3560.58, which was based on the three notes in question, and the other for $1,004.00, which was on an open account for beer. Subsequently, on January 30, 1916, a dividend for $178.02, was paid in the bankruptcy proceedings on the claim made on the notes, and, later, a final dividend of $195.82. After the bankruptcy proceedings, Bert Schreiber again went into the saloon business, and for about a year and a half bought his beer from the plaintiff.

The total of principal and interest of the three notes at the time ofthe trial, was $5520.51. The dividends in the bankruptcy proceedings, and interest thereon, amounted to $571.67. Subtracting that amount from the principal and interest of the three notes, leaves the sum of $5129.44, principal and interest, and at the time of the trial, according to the face of the notes.

(1) It being admitted that as between the plaintiff and Schreiber Brothers Company that the notes themselves were duly executed and delivered to the plaintiff, and for a sufficient consideration, the question arises, were they endorsed by Bert Schreiber for the accommodation of the plaintiff or for the accommodation of Schreiber Brothers Company. We are of the opinion that to hold otherwise than that all thre of the endorsements by the defendant were for the accommodation of Schreiber Brothers Company, would be clearly against the weight of the evidence.

In the fall of 1918, an involuntary petition in bankruptcy was filed against Sawtelle Brothers Company, and subsequently it was adjudicated a bankrupt. In these proceedings, the plaintiff filed two claims, one for $2880.88, which was based on the three notes in question, and the other for $1,004.00, which was on an open account for beer. Subsequently, on January 30, 1919, a dividend for $175.00, was paid in the bankruptcy proceedings on the claim made on the notes, and, later, a final dividend of $138.82. After the bankruptcy proceedings, Bert Sawtelle again went into the saloon business, and for about a year and a half bought his beer from the plaintiff.

The total of principal and interest of the three notes at the time either sued, was $2880.81. The dividends in the bankruptcy proceedings, and interest thereon, amounted to $317.07. Subtracting that amount from the principal and interest of the three notes, leaves the sum of $2132.64, principal and interest, and at the time of the trial, according to the face of the notes.

(1) It being admitted that as between the plaintiff and Sawtelle Brothers Company that the notes themselves were duly executed and delivered to the plaintiff, and for a sufficient consideration, the question arises, were they endorsed in Bert Sawtelle for the accommodation of the plaintiff or for the accommodation of Sawtelle Brothers Company. We are of the opinion that to hold otherwise than that all the evidence presented by the defendant and in rebuttal of the endorsement of Sawtelle Brothers Company, would be clearly against the weight of the evidence.

The three sections of the Negotiable Instruments Act which pertain to the questions here involved, are as follows:

"Section 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party, and in case a transfer after maturity was intended by the accommodating party, notwithstanding such holder acquired title after maturity."

"Section 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an endorser, unless he clearly indicated by appropriate words his intention to be bound in some other capacity."

"Section 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is a bill or note, payable to the order of a third person * * * he is liable to the payee and to all subsequent parties.

"2. If the instrument is a note, payable to the order of the maker or drawer, or is payable to bearer, he isliable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

The history of the relations of the parties is convincing that Bert Schreiber endorsed the notes in question to accommodate the business of Schreiber Brothers Company. Prior notes had been given, some for beer, and some for money loaned, and from time to time some of those notes were renewed, and there is no doubt renewed as an accommodation to the Schreiber Brothers Company in order to help it along when it was in need of credit or cash. Bert Schreiber admitted that when he went into the company, the original notes were

The three sections of the Negotiable Instruments Act which pertain to the questions here involved, are as follows:

"Section 88. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party, and in case a instrument for value is intended by the accommodation party, notwithstanding such holder acquired title after maturity."

"Section 89. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

"Section 84. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is a bill or note, payable to the order of a third person " " he is liable to the payee and to all subsequent parties.

"2. If the instrument is a note, payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

The history of the relations of the parties is that when he went into the company, the original notes note it was in need of credit or cash. Most Carpenter admitted the Carpenter Brothers Company in order to help it along when renewed, and there is no doubt renewed as an accommodation to money loaned, and from time to time some of these notes were later notes had been given, some for bear, and some for tion to accommodate the business of Carpenter Brothers Company, convincing that Bert Carpenter endorsed the notes in ques-

in existence, and that from time to time thereafter they were renewed, and that when he was treasurer he signed them; that although he did not remember that he endorsed any while Bolotin was treasurer, he might have done so. As to the notes generally, he said, "I simply don't remember whether I did endorse any of the notes or not." Further, he testified that when Flannigan called to get his endorsements "He said he had been to the bank to discount these notes and they sent them back and wanted the endorsement of one of the Schreiber Brothers on the notes."

The evidence of Cooke is that he had a distinct recollection that Bert Schreiber brought the notes to his office and endorsed them there; that he did not dispute his liability, but told him, Cooke, a dozen times after the notes were due that he would pay up, but that he was in bad shape then and wanted him, Cooke, to loan him money so that he could start up again; that Bert Schreiber never intimated that the plaintiff's claim was against the Schreiber Brothers Company. Of course, Bert Schreiber received personally no consideration for the endorsement of the notes, but that was not necessary. As said in Naef v. Potter, 226 Ill. 628, accommodation paper necessarily pre-supposes that no consideration was given for it; that if an accommodation endorser could defeat a note because he received no consideration for it, accommodation paper would, as a result, be eliminated from commercial transactions.

It is urged that as Bert Schreiber testified that he did not endorse the notes until about two or three days after they were dated, that "a new consideration for the endorsement was required," and Funk v. Hosack, 129 Ill. App.

in existence, and that from time to time thereafter they were renewed, and that when he was treasurer he signed them; that although he did not remember that he endorsed any while Mollatin was treasurer, he might have done so. As to the notes he merely said, "I simply don't remember whether I did endorse any of the notes or not." Further, he testified that when Kinnicutt was unable to get his endorsements he said he had been to the bank to discount those notes and they sent them back and wanted the endorsement of one of the Carpenter Brothers on the notes."

The evidence of Cooke is that he had a distinct recollection that Bert Carpenter brought the notes to his office and endorsed them there; that he did not dispute his liability, but told him, Cooke, a dozen times after the notes were due that he would pay up, but that he was in bad shape then and wanted him, Cooke, to lend him money so that he could start up again; that Bert Carpenter never intimated that the plaintiff's claim was against the Carpenter Brothers Company. Of course, Bert Carpenter received personally no consideration for the endorsement of the notes, but that was not necessary. As said in Abel v. Potter, 200 Ill. 628, accommodation parties necessarily presume that no consideration was given for it; that it is accommodation enough that the accommodated person will derive a sale because he received no consideration for it, accommodation paper would, as a result, be eliminated from commercial transactions.

It is urged that as Bert Carpenter testified that he did not endorse the notes until about two or three days after they were dated, that "a new consideration for the

421 is cited, but in that case, it appears, taking it in conjunction with the same case when it was first on appeal - reported in 115 Ill. App. 340 - that the signature involved was made as maker, and not endorser, and was not put on the note until about five months after it had been made out and signed by another party, and delivered to the payee. In the instant case, the transactions were endorsements, no consideration being necessary, and they were made practially contemporaneously with the delivery of the notes.

(3) Does the evidence show that due notice of dishonor was given? Section 104, Chap. 98 of the Negotiable Instruments Act is as follows: "Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." The evidence of Cooke is that he signed a letter and gave it to the postman on December 26, 1923, addressed to Bert Schreiber, 1901 South Troy street, notifying him that the Schreiber Brothers Company note of August 26, 1915 for $750.00 had not been paid, and wrote therein, "as you have guaranteed same you will please call at this office and arrange to meet same;" that he sent a similar letter on January 10, 1916, in regard to the note of September 10 for $1146.25; and the same on January 20, in regard to the note of September 20; that in his office, he talked to Bert Schreiber after each of the three notes became due and after the bankruptcy; that Bert Schreiber said he had received the letters, but could not then pay, but some day would. Copies of the three letters were put in evidence. Bert Schreiber denied ever having received any of them or having had any conversation with Cooke in regard to the notes not being paid; but admitted he knew they had never

(3) Does the evidence show that due notice of dishonor was given? Section 108, Chap. 98 of the Negotiable Instruments Act is as follows: "Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." The evidence of Doole is that he signed a letter and gave it to the postman on December 26, 1922, addressed to Bert Sorrelson, 1005 South Troy street, Chicago, Illinois, notifying him that the Sorrelson Brothers Company note of August 26, 1918 for $150.00 had not been paid, and wrote thereon, "We are sorry we cannot come for all please call at this office and arrange to meet same;" that he sent a similar letter on January 10, 1923, in regard to the note of September 10 for $145.25; and the same on January 20, of September 10 for $145.25; that in his office, in regard to the note of September 26, that Bert Sorrelson be paid, but could not then be, just because due and after the maturity; that Bert Sorrelson called the letters, but could not then be, just some day month. Copies of the three letters were put in evidence. Bert Sorrelson denied ever having received any of the or having had any conversation with Doole in regard to [illegible]

ed in dated, but in that case, it appears, taking it in connection with the same case when it was first on appeal - reported in 118 Ill. App. 240 - that the signature involved was made an maker, and not indorser, and was not put on the note until about five months after it had been made out and signed by another party, and delivered to the payee. In the instant case, the transactions as a endorsements, notwithstanding being necessary, and they were made practically contemporaneously with the delivery of the notes.

been paid and that Schreiber Brothers Company had gone into bankruptcy before the notes were due. Bert Schreiber testified he lived at 1900 S. Troy street, and it is urged that as Cooke testified he indited the letters to 1900, but put 1901 on the envelopes of two of the letters, they were not properly addressed. As to the letter of September 20, which is addressed on its face to 828 W. 14th Place, Cooke testified that he mailed the letter to Bert Schreiber.

Considering all the evidence in the case, we think it would be clearly against the weight of the evidence for the jury to hold that sufficient notice of dishonor was not given.

(3) As to the instructions: It is urged for the plaintiff that the learned trial judge erred in modifying two instructions by striking out in one of them the words, "you must find the issues for the plaintiff in this case, and assess the plaintiff's damages in the sum of Five Thousand One Hundred and Twenty Nine and forty-four one-hundredths ($5,129.44) Dollars," and inserting in lieu thereof the words, "you are warranted in finding the issues on these points in favor of the plaintiff"; and in the other instruction, erred in striking out the words "you must find the issues in this case for the plaintiff," and inserting the words, "you are warranted in finding the issues on that point in favor of the plaintiff." We are of the opinion that the difference between the phrases, "you must find the issues" and "you are warranted in finding theissues," is immaterial and insubstantial.

The first of the two instructions, which is too

been paid and that Eubanker Brothers Company had gone into
bankruptcy before the notes were due. Herr Eubanker
testified he lived at 1800 S. Troy street, and it is urged
that as Doake testified he indited the letters to 1800, but
put 1801 on the envelopes of two of the letters, they were
not properly addressed. As to the letter of September 20,
which is addressed on its face to 882 S. 14th Place, Doake
testified that he mailed the letter to Herr Eubanker.

Considering all the evidence in the case, we
think it would be clearly against the weight of the evidence
for the jury to hold that sufficient notice of dishonor was
not given.

(3) As to the instructions: It is urged for the
plaintiff that the learned trial judge erred in modifying
the instructions by striking out in one of them the words,
"you must find the issues for the plaintiff in this case,"
and causes the plaintiff's damages in the sum of Five Thousand
One Hundred and Twenty Nine and Forty-four one-hundredths
($5,129.44) Dollars," and inserting in lieu thereof the
words, "you are warranted in finding the issues on these
points in favor of the plaintiff;" and in the other instruc-
tion, erred in striking out the words "you must find the issues
in this case for the plaintiff," and inserting the words,
"you are warranted in finding the issues on that point in
favor of the plaintiff." We are of the opinion that the
difference between the phrases, "you must find the issues"
and "you are warranted in finding otherwise," is immaterial
and inconsequential.

The first of the two instructions, which is in-

long to set out here in full, as it contained the two elements, (1) endorsement not on account of accommodation of the plaintiff, and (2) notice of dishonor, and ended, "you are warranted in finding the issues on these points in favor of the plaintiff," was properly given; and the second, as it pertained solely to the evidence bearing on the refusal of the plaintiff to accept the notes only after they were endorsed by the defendant, was properly given, because it ended, after being modified, with the words, "you are warranted in finding the issues on that point in favor of the plaintiff." In each of the two instructions referred to, the jury was restricted in its finding to the particular matters of fact therein set forth.

It is contended for the plaintiff that the court erred in giving the following instruction -

> "You are instructed that the preponderance of the evidence in a case is not determined by the number of witnesses testifying to any fact or facts, but in determining upon which side the preponderance is, you should take into consideration the opportunities for occasion of the witnesses seeing, knowing or remembering what they testify to or about; their conduct and demeanor while so testifying; their interest or lack of interest in the result of the case and the probability or improbability of the truth of their statements."

The instruction seems to be bad for two reasons. First, the categorical statement that the preponderance of the evidence in a case is not determined by the number of witnesses testifying to any fact or facts, is not necessarily true; and second, because in instructing the jury in determining upon which side the preponderance is, they are told to take into consideration only a few specific things, as though they were

considerations only a few specific things, as though they were which side the preponderance is, they are told to take into second, because in instructing the jury in determining upon testifying to any fact or issue, it may necessarily arise; and evidence in a case is not determined by the number of witnesses first, the categorical statement that the preponderance of the

The instruction seems to be bad for two reasons.

ployment."

the probability or improbability of the truth of his testimony, or by the result of the case and conduct and demeanor while testifying, their interest or lack of interest in the result of the case and remembering what they testify to or about, their time for cogency of the witnesses seeing, hearing or ye, you should take into consideration the circumstances but in determining upon which side the preponderance number of witnesses testifying to any fact or issue, the evidence in a case is not determined by the

"You are instructed that the preponderance of

court erred in giving the following instruction -

It is contended for the plaintiff that the particular matters of that charge set forth.

tions referred to, the jury was instructed in its finding to point in favor of the plaintiff." In each of the instructhe words, "you are warranted in finding the issues on that necessarily given, because it ended, after being modified, with the notes only after they were endorsed by the defendant, and the evidence pending on the return of the plaintiff to accept was properly given and the second, as it pertained solely to in finding the issues on these points in favor of the plaintiff, and (2) motion of dismissal, and ended, 'you are warranted (1) endorsement not on account of enumeration of the pleadlong to set out here in full, as it contained the two elements

of superior importance, and are not told that they must consider all the evidence in the case.

For the reasons given, the judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

182-30981

H. M. LUBLINER, ET AL., on appeal of Erie Amusement Co.,

APPELLANT,

vs.

FRANK R. GASTON,

APPELLEE.

243 I.A. 627

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On September 30, 1925, Harry M. Lubliner and Joseph Trinz, plaintiffs, brought suit in forcible detainer in the Municipal Court against Frank Gaston, to obtain possession of two lofts on the second and third floors of a building known as 1225 North Clark Street, and a store and two flats of a building, Number 1227 North Clark Street, Chicago. There was a trial before the court, without a jury, and, on December 8, 1925, a judgment, finding the defendant not guilty. This appeal is therefrom.

The premises in question were leased in writing on May 1, 1920, to the defendant for a three year period, ending April 30, 1923. The lease provided that the lessee "will not permit said premises to be used for any unlawful purpose, or purpose that will injure the reputation of the same, or of the building of which they are a part, or disturb the tenants of such building, or the neighborhood." It, also, provided that in order to enforce a forfeiture of the lease for default in any of its conditions "it shall not be necessary to make demands, or to

Opinion filed Dec. 29, 1888.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On September 20, 1888, Mary E. Mellinger and Joseph Tyler, plaintiffs, brought suit in forcible detainer in the Municipal Court against Frank Burton, to obtain possession of two lofts on the second and third floors of a building known as 1888 North Clark Street, and a store and two flats of a building, Number 1887 North Clark Street, Chicago. There was a trial before the court, without a jury, and, on December 8, 1888, a judgment, finding the defendant not guilty. This appeal is therefrom.

The premises in question were leased in writing on May 1, 1888, to the defendant for a three year period, ending April 30, 1892. The lease provided that the lessee "will not permit said premises to be used for any immoral purpose," or purpose that will injure the reputation of the same, or of the building of which they are a part, or disturb the tenants of said building, or the neighborhood." It also provided that in order to enforce a forfeiture of the lease for default in any of its covenants it shall not be necessary to make demand, or to

serve notice upon the lessee * * *, but the fact of the non-performance of any of the agreements of this lease, shall in itself, at the election of the lessor, without notice or demand, constitute a forfeiture of said lease, and at any and all times after such default, the said lessee shall be deemed guilty of a forcible detainer of said premises, and all notices required by any statute of the State of Illinois, or otherwise, are hereby waived." At the time these proceedings were begun, the lessee was holding over under a five year renewal clause. The plaintiff is the assignee of the original lessor. The premises in question and which were leased by the defendant, were part of what is called the Windsor Theatre Building, which contained 10 or 12 flats, four stores, and a theatre, containing 1300 seats, used for vaudeville and the exhibition of pictures.

It is the theory of the plaintiff that the defendant, the lessee, permitted such conduct to take place upon and about the premises in question by persons to whom he had sublet part of the premises, as to constitute a forfeiture of the original lease. No brief has been filed on behalf of the defendant. It is the law that if the terms of a lease between the plaintiff and the defendant are violated by the defendant's sub-tenants, the defendant is responsible therefor, whether or not he knew of such violation. Wheeler v. Earle, 59 Mass. 31. In the latter case, the court said, "By creating sub-tenants, the original lessee puts them in possession of the premises, and being thus in under him, their acts, if in violation of the condition of the lease, will cause a forfeiture." Burke v. Bryant, 138 At. 821.

The question then arises does the evidence sufficiently prove that the premises were used in such a way by the defendant, or his sub-tenant, as to justify a forfeiture of the lease; and, further, if there was a forfeiture, has the plaintiff condoned it?

Lustgarten, a theatrical manager of the Windsor Theatre from October, 1924, to October 12, 1925, testified that the theatre building was composed of ten or twelve flats, four stories, and a theatre of about 1300 seats; that two of the flats, in May 1925, "were rented to some people that were running women up there, and beer and different things"; that "Mother Peterson" was in one of the flats; that she had a reputation as a keeper of a house of ill repute; that he saw men and women go into her flat from every fifteen minutes to half an hour, Saturday and Sunday nights; that he saw girls around the building on the street, two or three at a time, soliciting; that he saw men and women going up to the doorways; that one of the two flats was vacant for several months, and occupied about nine months; that "Mother Peterson" was in her flat there for three or four months; that during that time the other flat was empty; that it was only during the period that she was there that men and women went up there; that she came there in May, and left some time in July, 1925, after a raid.

One Cox, a police officer who had been on that beat for about seven years, testified that he knew "Mother Peterson" as a woman who runs houses of prostitution; that he knew she had a flat on the premises in question in the summer of 1925; that in 1925, he assisted there times in making raids on the

building in question; that the first raid was made because there were two women on the street soliciting and taking men up into the building; that they went up and arrested two women and two men; that one of the flats at that time was used for prostitution; that he knew the women that went up there by seeing them in the neighborhood, and knew they were prostitutes; that the next raid was upon Mother Peterson's flat, about the latter part of the summer, in 1925; that he got there while the flat was being raided by three other officers; that when he got there the officers had raided the flat and taken several men and women, and several bottles of beer out of the premises; that the men and women were taken to the station and booked as inmates of a disorderly house, and one was charged as keeper; that the next raid was on September 26; that he took two officers with him and went to the third floor of the building, and knocked on the door; that the door was partly opened and then closed, and it became necessary to break one of the panels of the door in order to release the foot of one of the officers who was trying to get in; that when they got inside they found three men sitting in the front room, with two cans of beer before them; that the men said they had been solicited on the street to go up and drink beer; that they had been there, probably, a half hour; that he, the witness, then searched the flat and found about 500 bottles containing beer, which he destroyed; that he tasted the beer, and it had an alcoholic content of more than one-half of one per cent; that he knew the girls he referred to were prostitutes; that he had already arrested them two or three times; that they had been in his police station dozens of times.

One Delohy, who was manager of the Windsor Theatre in the months of July, August and September, 1925, testified that on Saturday, September 26, a raid was made between 8:30 and 9 P. M. and a patrol wagon came up with a number of policemen and stopped in front of the entrance to the flats; that after the police got there, he went upstairs to see the condition of the flat, and he saw the police offices sitting there opening up bottles; that there were three other men sitting on the bed; that the flat was in a terrible condition; that at the time he came down from the flat there was a large crowd out in front of the theatre.

The defendant, Gaston, testified that he had possession of the premises under the lease in question; that he sublet different portions to others; that he sublet the grocery store to one Goldberg, who has been in the premises about one year and a half; that the lofts were rented to some drapery people, who used the premises as a factory, and employed about twenty or twenty-five girls; that he never had any trouble with the flats until the Peterson woman was in there; that he had her brought into court, and obtained a judgment against her, and had her put out; that she rented the flat through someone who was in there before her; that he did not know the former tenant's name; that the former tenant told him that this woman wanted the flat; that she called him up and said she was going to give bank references, and wanted to take him to the Cosmopolitan Bank; that he told her he was too busy; that while she was in there he heard she was selling "Booze," and he then sought possession of the property.

and put her out; that she was not in there more than six weeks; that he never knew, with the exception of that one instance, that there was ever any improper conduct in or about the premises. On cross-examination, he testified that she went into possession some time in June, and that he did not know until afterwards that raids had been made on the premises before that time; that he did not know that disreputable characters were in there before she came; that he instructed his real estate men not to put anybody in there that was not all right. He was asked, "You have paid your rent to Lubliner & Trinz, haven't you, since this suit was started?" which was September 30, 1925, and he answered, "Yes."

It is contended for the plaintiff, as stated above, that what took place, as shown by the evidence, justified the forfeiture of the original lease, even though the conduct complained of was directly chargeable to a subtenant of the defendant. We think there is no doubt that the evidence sufficiently showed such misconduct in and about the premises in September as would justify the plaintiff in declaring a forfeiture and beginning suit in forcible detainer for possession of the premises.

It is not particularly important what took place at the first two raids, one being in the early part of the year, and the other in the summer, which was in "Mother Peterson's" flat, but that which is important is the evidence concerning the third raid, which was made on September 26, 1925. The fact that the defendant paid his rent prior to the institution of the suit would constitute a condonation of what is claimed transpired at the first two raids, the one in the early part of the year, and the other upon "Mother Peterson's"

flat in July. In other words, no matter what use of the premises was made by "Mother Peterson" and by the other subtenants at the time of the first and second raids, such use would not be grounds for forfeiture. Vintalora v. Pappas, 310 Ill. 115. We think the evidence of Cox, the police officer, and Denohy, manager of the theatre, as to what transpired on September 26, sufficient to justify a forfeiture of the lease. The suit was begun on September 30, 1925, and although the evidence of the defendant Gaston is that he had paid his rent to the plaintiff, since the suit was started, the receipt of that rent, in view of the terms of the lease, did not in any way condone the forfeiture. The lease provides, "that after the service of notice or the commencement of the suit * * *, the lessor may receive and collect any rent due; that the payment of said rent shall not waive or affect said notice, said suit, or said judgment;" That provision, therefore, justified the plaintiff in accepting the rent without in any way waiving his rights against the defendant for an unlawful use of the premises in September.

We are, therefore, of the opinion that the evidence shows that the defendant permitted such conduct to take place on or about the premises in question by persons to whom he had sublet part of the premises as to constitute a forfeiture of the lease.

The judgment will be reversed and the cause remanded with directions to enter judgment for the plaintiff. REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, J. AND THOMSON, J. CONCUR.

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243 I.A. 627

JOSEPH S. MARRONE,

APPELLEE,

vs.

CHICAGO & WEST TOWNS RAILWAY COMPANY, a Corporation,

APPELLANT.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On the evening of December 29, 1923, a street car of the defendant, Chicago & West Towns Railway Company, going east on West Madison Street, near Humphrey Avenue, ran into the rear of an automobile which the plaintiff, Joseph S. Marrone, owned and was driving. The plaintiff claimed he had been injured, and in February, 1924, brought suit in the Circuit Court for damages. There was a trial before the court, with a jury, and a verdict and judgment for the plaintiff in the sum of $1000.00. This appeal is therefrom.

The accident happened on Madison Street, an east and west street, a short distance west of where Humphrey Avenue, a north and south street, crosses Madison Street. There is a jog in Humphrey Avenue where it crosses Madison Street. The west line of North Humphrey Avenue strikes Madison Street at a point about 108 feet west of the west line of South Humphrey Avenue. On the south side of Madison Street, where South Humphrey Avenue meets Madison Street, there is the Main Garage, which extends from South Humphrey Avenue west about 135 feet to an alley, which runs south from Madison Street.

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Opinion Filed Dec. 29, 1908.

The first east and west street east of Humphrey Avenue is Austin Avenue. On Madison Street there are two street car tracks. Just west of Austin Avenue on Madison Street, there is a crossover, so as to permit street cars coming from the west to switch over from the east bound track to the west bound track. Madison Street at the junction of North and South Humphrey Avenue is 78 feet from curb to curb. It is a little over 30 feet from the south rail of the south track to the south curb on Madison Street. It is about 190 feet from the crossover switch on Madison Street to the alley at the west end of the Main Garage.

The evidence for the plaintiff, tends to show the following: - On the evening of the day in question, between 5:30 and 6:00 o'clock, the plaintiff, a man about 33 years of age, who had been working for Hart, Schaffner & Marks continuously for fifteen years as a sewing machine tailor, started from his home on South Lombard Street, which was a few blocks west of Humphrey Avenue, driving a six cylinder touring Elcar automobile, which he had had for three years and which he testified was in good running condition. In the automobile besides himself, were his wife, three children, and a boy named Price. He drove into Madison Street, and then turned east on the south side of Madison Street, intending - as he says - to stop at the corner of South Humphrey and Madison Street, and let out the Price boy, who lived just north across the street. Lombard Street, which is a north and south street, is about two and a half short blocks west of South Humphrey Avenue. When he was driving on the south side of Madison Street towards Humphrey Avenue, the wheels of his automobile were in the east bound street car tracks until he got to Lyman Avenue, at which point he

began to drive off the tracks. That, he was not able to accomplish entirely, according to his testimony, because a truck was standing at his right which compelled him to stay partly in the street car tracks and partly in the street to the south. A witness for the plaintiff, Spatafora, stated that at the time in question, he saw quite a few automobiles heading east in front of his, the Main Garage, waiting for traffic to move; that he noticed them standing still out in front of his place before the collision. The plaintiff stated that while his automobile was stopped, standing partly between the east bound tracks and the curb, there was an automobile in front of him about five feet away, and a truck standing between his automobile and the curb on the south side of the street. He stated further that he stood there for three or four minutes. His automobile, while standing still, was struck in the rear by a street car of the defendant and driven forward fifteen or more feet. At the time of the collision, between 5:30 and 6:00 p. m., it was getting dark. According to the plaintiff, he had turned on all the lights of the automobile when he started, and all the lights in the front and in the rear were burning at the time of the collision.

Keyes, a witness for the plaintiff, a truck driver, stated that he was opposite the plaintiff's automobile when the collision took place; that the headlights were lighted as the automobile was coming towards him, and that after the collision he noticed that one tail light was still lighted, and that one was broken.

Spatafora stated that it was fairly dark at the time of the collision, and that there were lights on the street.

After the accident, the plaintiff was taken to the West Suburban Hospital. The plaintiff testified that he did not remember anything between the time of the crash and the time he found himself in the hospital.

At the close of the plaintiff's evidence, counsel for the defendant requested the court to instruct the jury that the evidence was not sufficient to justify a verdict for the plaintiff; that motion was overruled, and we think properly.

It was urged for the defendant that the original and two amended counts of the declaration charged that the plaintiff was thrown out of the automobile upon the ground, and that the evidence did not support that charge. Later, however, the plaintiff was given permission to amend his declaration and did so, inserting in lieu of the words, "out of said automobile down to and upon the ground," the following, "in and about within said automobile." We think that corrected the error, although the error was, in our judgment, not one of substance, but, in reality, merely one of form, and, therefore, negligible.

The defendant offered in evidence the testimony of Meyer, the motorman of the street car; Rohr, a salesman, who was a passenger on the street car; Van Yek, the conductor of the street car; Ewald, the motorman of a street car that was going west; Proud, an electrical mechanical engineer, a passenger on the west bound street car; and Maver, a claim adjuster for the defendant.

Meyer, the motorman of the east bound street car, testified that when the street car he was driving reached Lombard Avenue, the automobile came out on the car tracks; that

he slowed down and sounded his gong; that when the automobile got within 100 feet of North Humphrey Avenue, it stopped and he, the motorman, applied his brakes and skidded into the automobile, and went on about 5 feet after the collision; that the automobile went on about 15 or 20 feet, when it stopped off the tracks to the south; that as the street car approached the automobile there were no automobiles between him and Austin Avenue; that he did not remember any truck being on the right-hand side of the street car tracks near the curb; that the automobile was going about 20 miles, or a little over, an hour when it came to a stop; that there was plenty of room for driving between the street car tracks and the south curb; that the street car stopped just east of the alley between Lyman Avenue and South Humphrey Avenue; that the lights of the automobile were unlighted, and there were no rear lights lighted; that the defendant did not at any time put out his arm or in any way signal that he was about to stop; that the automobile had not been standing on the track upwards of three minutes before the street car arrived; that immediately after the accident, the plaintiff got out of his automobile and looked around to see what damage was done to the back of it; that he finally got up, held his back, and laid down in the machine, and started to groan; that after he got out and asked the plaintiff if he did not hear the gong, the plaintiff said, "Yes;" that he then asked the plaintiff why he did not pull to one side, and the plaintiff said he was going to, but a Yellow Cab cut him off; that he, the witness, did not see any Yellow Cab. He further testified that he saw the automobile from the time it first came into Madison Street until he hit it; that the want of lights did not prevent him from seeing; that he knew it was there all the time; that the automobile was going at the rate of about 20

miles an hour, and was 30 or 40 feet ahead of the street car when it turned into the street car track going east; that he had his eyes on the automobile all the time; that he put on the brakes suddenly, and stopped as quickly as possible; that the street car was going about 20 miles an hour, the same speed as the automobile; that he tried to stop the street car when he was 30 or 40 feet behind the automobile.

The evidence of Rohr is that he was standing in the street car in question, and when he first saw the automobile it was about 30 feet ahead of the street car; that the collision occurred about 100 feet west of North Humphrey Avenue; that he did not see any truck between the automobile and the curb to the south or any automobile besides the plaintiff's ahead of the street car; that when he got out of the car he noticed the lights on the automobile were not lighted, but that he did not look at the rear of the automobile; that the plaintiff was walking on the left side of the automobile when he saw him, and held his hand to his back. On cross-examination, he testified that he heard the gong ring, and then got up to look out, and saw the automobile standing still, about 30 feet ahead of the street car.

The evidence of Van Yek, the conductor of the car was that he heard the air put on and the bell ringing, and felt the street car sliding along that he walked from the center of the car to the door and saw the street car slide into the automobile and go about 15 feet after striking; that there were no lights on the automobile; that he did not see any truck

between the street car and the south curb; nor any automobiles ahead of the one struck; that after the collision the motorman asked the plaintiff if he did not hear the gong, and the plaintiff said, "Yes, I did, but there was a Yellow Cab cut me off;" that he looked for the Yellow Cab, but did not see anything ahead; that after that, the plaintiff got into the machine, laid down on his back on the floor of the automobile, and groaned.

The evidence of Ewald, the motorman of the street car going west, was to the effect that he started at Austin Avenue and stopped at North Humphrey Avenue to take on passengers; that he saw the automobile coming east about 100 feet west of North Humphrey Avenue; that the automobile stopped suddenly in front of the street car, and the street car struck it, and it went about 15 feet; that the automobile was a long ways west of the Main Garage, and not up to the alley; that he saw no automobiles east bound, except the one that was struck; that he saw no truck between the automobile and the curb on the south side; that the street car was about half a car length away when the automobile stopped.

The evidence of Proud, who was standing in the vestibule of the west bound street car, was to the effect that there was no light on the automobile; that there was no automobile in sight except the one that got hit; that the automobile, after being struck, went forward about 15 to 20 feet; that the street car was almost at a stop when the collision took place; that at the time the

automobile was struck it was standing still, but had not been standing still long; that the automobile, prior to that was coming slowly; that the street car was probably 25 or 30 feet back of it when it was stopped.

The evidence of Raver, the claim adjuster, was to the effect that about ten days after the accident, he saw the plaintiff, and the plaintiff said, "I wanted to turn north across Madison Street to let a little boy out at his home on North Humphrey Avenue;" that arriving at the point where the collision occurred, he was compelled to stop because of traffic which cut him off from going farther; and that there were automobiles, especially a Yellow Cab, which cut him off so he had to stop where he was for some minutes, when a street car, without any warning, came up from the west and struck him in the rear; that he, the witness, saw the automobile in the plaintiff's garage; that the rear bumper was damaged, and a spare tire carrier on the rear had a dent in it, and the left rear fender was slightly bent.

At the close of all the evidence, counsel for the defendant requested the court to instruct the jury that the evidence was not sufficient to justify a verdict for the plaintiff; that motion was overruled, and, we think, properly.

It will be seen from the foregoing resume, that the jury may have concluded, and without their conclusion being manifestly against the weight of the evidence, that the plaintiff, owing to traffic conditions, necessarily stopped and so was not chargeable with negligence, and that the motorman was careless in not avoiding a collision.

Inasmuch as the motorman admitted that he saw the automobile ahead of him all the time, and as he knew that it was growing dark and no hand signal could reasonably be expected, or if exhibited could not very well be seen, and as he knew that the automobile might stop at any time, owing to traffic conditions (assuming the plaintiff's and Spatafora's testimony to be believed, or assuming that a Yellow Cab cut him off), and as there is evidence that the automobile before being struck had been standing still for some time, the jury may have concluded, and without their conclusion being manifestly against the weight of the evidence, that the motorman's conduct alone was the cause of the collision, and constituted in and of itself a want of ordinary care. Although the testimony is somewhat conflicting as to various important elements, such as the exact whereabouts of the automobile when it was struck, the rear lights, the condition of the traffic; the presence of a truck at the plaintiff's right, or the passing of the Yellow Cab, we do not feel justified, - particularly as the proper determination of those matters was greatly dependant upon the credibility of the witnesses - in concluding that the holding of the jury that the motorman was guilty of negligence in driving into the automobile, and the holding of the jury that the plaintiff was not guilty of contributory negligence, were manifestly against the weight of the evidence.

It is contended that the plaintiff violated certain ordinances of Oak Park. That was a question for the jury. It

was instructed on that subject; and considering the evidence for the plaintiff as to the situation he was in, his physical environment, as he approached the alley or a point to the north or northwest of the Main Garage, we cannot, reasonably, hold that the jury erred in concluding that there was no violation of the ordinances for which the plaintiff was in any way legally responsible.

It is contended that the trial judge erred in striking our part of an answer given by one of the defendant's witnesses, a Doctor Cole. The doctor had been asked to state what he found upon an examination of the plaintiff at his home, and he answered, "My conclusion was that there was nothing unusually wrong with this man, from my findings and from the doctor's (meaning Dr. Monaco's) findings, that we believed that he was malingering." Upon objection for the plaintiff, the trial judge struck out the words, "we believed he was malingering." That ruling was correct. The fact that it was put in the plural, and purported to give not only Dr. Cole's belief, but, also, that of Dr. Monaco, was sufficient to make it objectionable. The witness was then asked, "Was that your personal opinion," and he answered, "That was my personal opinion." That answer was then, on objection, stricken out, the trial judge, saying, "What he believes the patient or the subject was doing may go out. That's for the jury, I take it." We think that ruling was correct. The jury was entitled to know what, if anything, in the way of symptoms or representations the doctor had discovered, but not, what he might conjecture the plaintiff was doing. That was properly for the jury.

As to the instructions. Complaint is made that plaintiff's instruction numbered 1 should not have been given. That instruction is, in part, as follows: "In determining on which side the preponderance of evidence is, the jury may take into consideration the number of witnesses testifying; the opportunities of the several witnesses for seeing or knowing the things about which they testify * * * and from all these circumstances, together with all the other facts and circumstances proved upon the trial, determine upon which side is the greater weight or preponderance of the evidence." Inasmuch as the instruction not only includes the elements specifically mentioned therein in detail, but also informs the jury that it is necessary to take those elements, "together with all the other facts and circumstances proved upon the trial," it becomes exhaustive and is not objectionable.

Complaint is made that plaintiff's instruction numbered 6 should not have been given. It is as follows: "The law does not give a street car company the right to the exclusive use of the part of the street occupied by the street car tracks, but the street car company is required by law to operate its cars over its tracks with a due regard to the rights of the public in the use of the street." The same instruction, verbatim, was given in the case of Walsh v. Chicago Railways Co. 303 Ill. 339, 349. The court there said, "This instruction laid down a correct rule of law with reference to the rights of a street car company in the use of the streets."

It is contended that the judgment is excessive. The evidence as to plaintiff's alleged injuries is voluminous. We have examined it and are compelled to conclude that it does not show that the verdict, as to amount, is manifestly against the weight of the evidence. The plaintiff's evidence is that he suffered pain in his back; that he was taken to a hospital where he remained four days; that he had great difficulty in urinating; that after he was taken home, he was in bed three weeks; that in four weeks he went back to work, but could not do his work on account of pain; that he has had, and still has, trouble and pain when urinating. The evidence of his attending physician is that he treated the plaintiff continually after he was taken home; that on a general physical examination he discovered that the plaintiff had some lesion in the lower part of the abdomen, and on palpation, there was pain in that region, symphysis pubis; that he treated him as to diet, rest and medicine, the latter, in part, for bladder disinfection; that when he first examined him, he claimed he was in pain, had no strength, could not work; that he had a slight fever every day which indicated an acute inflammatory condition in the bladder, probably caused by traumatism; that he has treated the plaintiff from the beginning, off and on, up to the time of the trial; that he made twenty-four different visits to the plaintiff; that the plaintiff visited his office at least twelve times, over a period of three months, and his charge for services would be, at least, $150.00. He further testified that from time to time the plaintiff had a temperature and pulse above normal; that sometimes his temperature ran as high as 102; also, that his pulse ran from 90 to 105.

ran from 30 to 102°.

The evidence of Mrs. Cole and Jenkins, called for the defendant, is chiefly negative, tending to show that they were unable to discover that the plaintiff had suffered any injury as the result of the accident. Their judgment may have been correct. As, however, there was a conflict in the evidence as to the injuries suffered, if any, and it was submitted to the jury, we are not able, after reasonably considering all of it, to conclude that the verdict of the jury was excessive. If the jury believed the evidence of the plaintiff and Mr. Monaco, on the subject of the plaintiff's injuries, and we see no reason why, considering all the evidence in the case on the subject, they may not justifiably have done so, the verdict, instead of being excessive, was very reasonable. It is suggested for the defendant that the plaintiff was malingering. We find no substantial evidence to support any such contention.

For the foregoing reasons, and finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

311-31030

243 I.A. 627

THE TRIBUNE COMPANY, a corporation,

APPELLEE,

vs.

EMERY MOTOR LIVERY COMPANY, a corporation,

APPELLANT.

APPEAL FROM
THE SUPERIOR COURT
COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Inasmuch as this cause was here on appeal once before - The Tribune Company v. Emery Motor Livery Co., 232 Ill App. 309 - it will be unnecessary to set forth the facts of the case in detail.

The cause was begun in the Superior Court on July 28, 1919. A declaration was filed, to which the defendant pleaded the general issue. Later, the plaintiff, pursuant to leave given, filed an additional count to its declaration, to which the defendant filed a general demurrer. That demurrer was overruled, and the defendant filed a plea of the general issue, and a plea that it did not operate the automobile at the time in question. On January 30, 1922, there was a trial before the court with a jury, and a verdict for the plaintiff in the sum of $4,595.00. On February 18, 1922, judgment was entered on the verdict and an appeal taken to this court. That appeal was decided by this court on February 27, 1924, and is reported, as stated above.

It was urged for the defendant, on that appeal, that as there was no proof that there was any agreement between the injured party and his employer as to the amount of com-

Opinion filed Dec. 29, 1936.

pensation payable to him, the judgment should be reversed. The two cases of Bauer v. Busetos & Co., 306 Ill. 602, and Schlitz Brewing Co. v. Chicago Railways Co., 307 Ill. 322, were cited.

In our opinion, on the former appeal, we said:

"The evidence in the instant case shows that the employee at the time he was injured was getting a salary of $33.00 a week, and there is evidence that after he was injured he received $12.00 a week extra from his employer, the plaintiff. For just what time that extra amount was paid, is not definitely shown, so that it is impossible for us, on the face of the record, to compute it. In our judgment, if the plaintiff paid the employee, Herbeck, $12.00, or any other sum of money, a week as compensation for his injury, and it was received by the employee as compensation paid him for his injury, then the employer is entitled, although no award has been made under the Workmen's Compensation Act by the Industrial Board to recover from the defendant the extra amounts so paid, provided it is not in excess of the maximum amount which is provided for by the act, under the circumstances, as an award by the Commission.

Nowhere in the record does it appear that the amount to be paid the employee by the plaintiff has been fixed or determined either by an award or by an agreement of the parties; and, under the reasoning in the Schlitz case, supra, until that is done, the amount payable to the employee by the third party could not be known, and therefore 'the limit of the amount the employee is authorized to recover' could not be determined; and, so, as a further consequence, until the amount to be paid the employee is so fixed either by an award or by an agreement, the employer is not in a position to sue the third party and recover such an amount. However, if the employer actually pays the employee weekly compensation under the act, and the amount paid is within the amount fixed and payable under and by the terms of the act, it is only reasonable to conclude that the parties have by their conduct impliedly agreed to fix the amount to be paid, at least to the extent of the payments actually made, and as a result, the employer would then be entitled to sue the third party and recover the aggregate amount of the payments so made, up to the time suit was brought. As the record does not show that there was even an award or an express agreement made, but does show that payments were actually made by the plaintiff to its employee, the judgment will be reversed and the cause remanded for a new trial."

On April 30, 1924, pursuant to a mandate from this court, the cause was redocketed in the Superior Court.

On July 8, 1924, pursuant to notice, an order was entered giving leave to the defendant to withdraw its plea, and

file a demurrer within five days. On the same day, the defendant filed a general demurrer to the plaintiff's declaration, and on October 29, 1925, the demurrer was sustained, and on October 31, 1925, the plaintiff electing to stand on its declaration, judgment was entered dismissing the cause at the plaintiff's costs. This appeal is from that judgment.

The questions arise, to what extent was the judgment of this court on the former appeal, res adjudicata, and was the defendant entitled, after redocketing the cause, to demur to the plaintiff's declaration.

In Prentice v. Crane, 240 Ill. 350, the court said, that, upon reversing a judgment or decree and remanding a cause, the court "may direct the inferior court to enter a particular judgment or decree or give directions which will have that effect. In any case, it is the duty of the inferior court to examine the opinion and conform its action to it, and in case of a general order reversing the judgment or decree and remanding the cause without specific directions, it must be determined from the nature of the case what further proceedings will be proper and not inconsistent with the opinion." Also, in that case, the court quoted with approval from West v. Douglas, 145 Ill. 164, the following, "The rule is, that a decision of a case by an appellate court on the merits is final as to the matters decided, and is conclusive upon the parties upon a second appeal or writ of error in the same case."

In our former opinion in that case, we said, in substance, as quoted above, that the plaintiff, the employer, was entitled to sue the defendant and recover the aggregate amounts paid to plaintiff's employee up to the time suit was brought,

and as the evidence showed that the plaintiff had paid the injured party $12.00 a week extra, but did not show for just what time that extra amount was paid and so it was impossible for us, on the face of the record, to compute it, the judgment had to be reversed and the cause remanded. We said very plainly, we think, that all the trial court had to do after redocketing the case was to hear evidence showing that amounts had been paid up to the ~~time of the trial~~ time suit was brought, and to enter judgment, accordingly.

To permit the defendant, after the cause was redocketed, to demur to the declaration, would be to nullify the former judgment of this court. After there had been a trial, verdict, judgment and appeal, and a reversal and remandment for the sole purpose of determining the amount paid up to the time of the trial, the defendant was not then entitled to file a demurrer and attack the declaration, and thus undo and set at naught all that had been, up to that time, adjudicated and settled.

The judgment will be reversed and the cause remanded, with directions to assess the plaintiff's damages for the amount it may show it paid out up to the time suit was brought- not exceeding the aggregate amount payable under the Act - and enter judgment against the defendant therefor.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, J. AND THOMSON, J. CONCUR.

28 — 30830

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

CHARLES W. GILLETT,
Plaintiff in Error.

243 I.A. 627

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

We have this day handed down an opinion in the case of People of the State of Illinois v. Charles W. Gillett, No. 30819, wherein the information and all of the facts are the same as the information and facts in this case, except that in the instant case, the charge is that the bonds in question were sold to Jared W. Fox instead of to Charles R. Godding as alleged in People v. Gillett, No. 30819, and for the reason stated in that case, the judgment, of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

52 - 30819

THE PEOPLE OF THE STATE OF ILLINOIS,	
Defendant in Error,	
v.	
CHARLES K. DAVIES,	
Plaintiff in Error.	24381-A. 62
	ERROR TO
	MUNICIPAL COURT
	OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

We have this day handed down an opinion in the case of People of the State of Illinois v. Charles K. Davies, No. 30819, wherein the information and all of the facts are the same as the information and facts in this case, except that in the instant case, the charge is that the bonds in question were sold to Jared W. Fox instead of to Charles K. Gedding as alleged in People v. Gillett, No. 30819, and for the reasons stated in that case, the judgment, of the municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

80 - 30876

CHARLES COON, GERTRUDE COON, AND ELLSWORTH T. MARTIN, Trustee,

Appellants,

v.

MORRIS G. LEVINSON, ET AL,

Defendants.

- - - -

MEYER SHAPIRO AND ROSE SHAPIRO,

Appellees.

243 I.A. 627

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On December 15, 1922, the defendant, Morris G. Levinson, executed his note in the sum of $5,000.00, evidencing the balance of the purchase price of certain real estate which that day he bought from Ellsworth T. Martin. And to secure the payment of this $5,000.00, Levinson executed his trust deed conveying the premises to Martin as trustee. The interest was due and payable on the 15th of June and December of each year. Levinson failed to pay the semi-annual interest due June 15, 1923, and the complainants Coon, who were owners of the notes and trust deed declared the entire indebtedness due and on August 1, 1923, filed their bill to foreclose. On July 19, 1923, Levinson conveyed the premises to the defendant, Meyer Shapiro, by warranty deed, the consideration being $10.00. A fifty cent revenue stamp was affixed to the deed. Meyer Shapiro and Levinson were made parties defendant to the foreclosure suit. Levinson was served and filed his answer wherein he denied that there was any default in the

2431.A. 627

APPEAL FROM

DISTRICT COURT,

COOK COUNTY.

Opinion filed Dec. 29, 1936.

Appellees.

v.

Appellant.

Abstracts.

- - - -

Appellees.

Mr. JUSTICE O'CONNOR delivered the opinion of the court.

On December 18, 1933, the defendant, Morris B. Levinson, executed his note in the sum of $5,000.00, evidencing the balance of the purchase price of certain real estate which that day be bought from Ellsworth T. Martin. And to secure the payment of this $5,000.00 Levinson executed his trust deed conveying the premises to Martin as trustee. The interest was due and payable on the 18th of June and December of each year. Levinson failed to pay the semi-annual interest due June 18, 1935, and the complainants Dora, who were assignees of the notes and trust deed declared the entire indebtedness due and on August 1, 1935, filed their bill to foreclose. On July 18, 1935, Levinson conveyed the premises to the defendants, Meyer Shapiro, by warranty deed, the consideration being $10.00. A fifty cent revenue stamp was affixed to the deed. Meyer Shapiro and Levinson were made parties defendants to the foreclosure suit. Levinson was served and filed the

payment of the semi-annual interest due June 15, 1923, and alleged that the interest had been paid by him by reason of the fact that he had paid certain assessments levied against the property. A man named Meyer Shapiro was also served, but it appeared that he was not the defendant. On October 23, 1923, the complainants by leave of court, amended the bill by making Shapiro's wife Rose, an additional party defendant. Summons was issued and returned "not found". An affidavit of non-residence was filed as to the two Shapiros, publication had, and later they were defaulted for want of appearance. It appears that Levinson strenuously contested the suit which was referred to a master in chancery, but the master found against him and recommended that a decree be entered in accordance with the prayer of the bill. The chancellor sustained the master except as to one matter which is now immaterial and entered a decree of foreclosure on May 6, 1924. The decree found the amount due was $5813.95, which included $400.00 solicitor's fees. Levinson prosecuted an appeal from that decree to this court where upon consideration the decree was affirmed, on the 10th of October, 1925. (Coon v. Levinson, No. 29860 Ill. App. Ct.) On November 4th, 1925, Shapiro and his wife Rose, upon notice, presented their petition in the foreclosure suit, setting up that they had been served by publication and had not received the notice requested to be sent by mail, and praying that they be given leave to file an answer to the bill. The petition which was sworn to by Meyer Shapiro, set up, inter alia, that he had purchased the premises in July, 1923, from Levinson and admitted that the property was subject to the trust deed and stated that he was conducting a drug store in Chicago and that his name and telephone number

payments of the semi-annual interest due June 15, 1922, and alleged that the interest had been paid by him by reason of the fact that he had paid certain assessments levied against the property. A writ named Mayor Shapiro was also served, but it appeared that he was not the defendant. On October 23, 1922, the complainants by leave of court, amended the bill by making Shapiro's wife Rose, an additional party defendant. Summons was issued and returned "not found". An affidavit of non-residence was filed as to the two Shapiros, publication had, and later they were defaulted for want of appearance. It appears that Levinson strenuously contested the suit which was referred to a master in chancery, but the master found against him and recommended that a decree be entered in accordance with the prayer of the bill. The chancellor sustained the master except as to one matter which is now immaterial and entered a decree of foreclosure on May 8, 1924. The decree found the amount due was $2811.38, which included $200.00 solicitor's fee. Levinson prosecuted an appeal from that decree to this court where upon consideration the decree was affirmed, on the 10th of October, 1925. (Green v. Levinson, No. 20220 Fil. Dep. 0f.) On November 4th, 1922, Shapiro and his wife Rose, upon notice, presented their petition in the foreclosure suit, setting up that they had been served by publication and had not received the notice requested to be sent by mail, and praying that they be given leave to file an answer to the bill. The petition which was sworn to by Mayor Shapiro, not by Xavier Alle, that he had purchased the premises in July, 1922, from Levinson and admitted that the property was subject to the trust deed and stated that he was entering

appeared in the directory and other facts tending to show that, complainants could have found him and his wife so that service could have been had in the foreclosure suit. The petition further set up that when he purchased the premises from Levinson, the latter advised him that the interest due June 15, 1923, had been paid, and that when the next semi-annual interest became due, December 15, 1923, he tendered it at complainant Martin's office where by the terms of the notes the interest was made payable, but that Martin refused to accept such semi-annual interest. It is further alleged that Shapiro was at all times ready to pay the $5,000.00 incumbrance and any unpaid interest; that Shapiro was advised that an appeal was pending in the Appellate Court from the decree of foreclosure and that he could do nothing further until the cause was reinstated in the trial court and therefore, he deferred filing his petition until the cause had been re-docketed in the Circuit Court. The prayer of the petition was that the decree be declared null and void as against him and that upon payment of the amount due, principal and interest and the trustee's release fee, that the trust deed and notes be delivered up and cancelled.

The complainants, Coon, filed their answer to the petition in which they admit that some one about December 15, 1923, offered to pay the semi-annual interest falling due at that time, at Martin's office, and averred that payment had been refused and the party who made the tender advised that this was done because of the foreclosure suit. Other matters are set up in the answer which we think unnecessary to refer to here. The court permitted the Shapiros to file their answer to the bill and it was accordingly

appeared in the directory and other facts tending to show that complainants could have found him and his wife at that service could have been had in the foreclosure suit. The petition further set up that when he purchased the premises from Levine & the latter advised him that the interest due June 15, 1923, had been paid, and that when the next semi-annual interest became due, December 15, 1923, he tendered it at complainant Martin's office where by the terms of the notes the interest was made payable, but that Martin refused to accept such semi-annual interest. It is further alleged that Shapiro was at all times ready to pay the $6,000.00 incumbrance and any unpaid interest; that Shapiro was advised that an appeal was pending in the Appellate Court from the decree of foreclosure and that he would do nothing further until the cause was reinstated in the trial court and therefore, he declared filing his petition until the cause had been re-docketed in the Circuit Court. The prayer of the petition was that the decree be declared null and void as against him and that upon payment of the amount due, principal and interest and the trustee's release fee, that the trust deed and notes be delivered up and cancelled.

The complainants, Dunn, filed their answer to the petition in which they admit that some one about September 15, 1923, entered into a contract with the petitioner Shapiro whereby the latter agreed to pay the semi-annual interest falling due at that time, at Martin's office, and averred that payment had been refused and the party who took the tender advised that this was done because of the foreclosure suit. Other matters are set up in the answer which we think unnecessary to refer to here. The court permitted the Shapiros

filed on November 24, 1935. On December 14, 1935, the court after hearing evidence, entered an order providing that Shapiro pay the $5,000.00 principal and interest thereon at the rate of 6 percent from December 16, 1932 (the date of execution of the note and mortgage) to the date of the entry of the order, costs amounting to $11.00 and $350.00 for complainant's solicitor's fees. This order or decree found that Meyer Shapiro had tendered to complainants in open court the total amount required, viz. $6248.50, but that the tender was refused and it was decreed that upon payment of this amount, together with $5.00 release fee to the complainant, Coon, the note and trust deed be delivered up and cancelled. And it was further decreed that the suit be dismissed for want of equity. From this order the complainants, Coon prosecuted this appeal.

Meyer Shapiro, called on his own behalf, testified that he was a brother-in-law of Levinson, the maker of the papers and that he purchased the property in July, 1933; that at that time he did not know that the semi-annual interest, due June 15, 1933, was unpaid and the coupon evidencing this interest was uncancelled; that Levinson stated to him he would take care of the payment of the interest and that he relied upon Levinson to do so; that the reason he did this was that Levinson owed him some money; that he did not know of the foreclosure suit until he was advised that the case was pending upon appeal in this court; that he did not make the tender of the semi-annual interest due December 15, 1933, as he had alleged in his verified petition, but that Levinson had told him that he had made the tender; that it was his agreement with Levinson he would take care of the interest that the

witness had nothing to do with it. He further testified that Levinson was to take care of the payment of the principal note and the foreclosure suit and advise Shapiro what was done; that he relied upon this agreement; that he never paid any interest accruing on the mortgage; that when he purchased the property from Levinson, the latter told him that he would attend to paying the interest and that Levinson was a lawyer and he took his advice and relied upon him; that everything was left to Levinson. There is other evidence in the record, but in the view we take of the case, it is unnecessary to refer to it here.

By virtue of the provisions of Sec. 19 of the Chancery Act, Shapiro and his wife having been served by publication and the testimony showing that they had not received the notice, which was mailed to them, they had a right to file their answer to the bill. It is also the law that, upon the filing of their petition praying that they be given leave to answer, which petition disclosed the fact that they had not received the notice mailed to them, the cause proceeds exactly the same as any other chancery suit, as though they had appeared in due time "except that the decree stands pending the hearing and would not be confirmed, set aside, altered or amended until the conclusion thereof." First Cong. Church v. Page, 257 Ill. 473. After their answer was filed, the Shapiros were entitled to be heard, as they were, upon the merits. They, however, make no contention that complainants, Coon, were not justified

in declaring the entire indebtedness due on account of the failure to pay the semi-annual interest falling due June 15, 1923, but they seek to be relieved from the payment of master's fees and other costs and the court sustained them in this contention. But we are of the opinion that the decree should not have been vacated or set aside and the suit dismissed because it appears from Shapiro's own testimony that what the defendant Levinson did in the matter of payment of the interest was done as Shapiro's representative, because his testimony is that when Shapiro purchased the property it was expressly agreed between him and Levinson that the payment of the interest should be taken care of by Levinson who was a lawyer and his brother-in-law. It follows, therefore, that the contest of Levinson in insisting that there was no default in the payment of the interest, was the contest of Shapiro, and he having been defeated in that suit by the decree, which was affirmed by this court, he is in no position now to urge that the master's fees and other costs ought to be taxed against him. Nor was the court warranted in dismissing the suit, in any event, without requiring the money to be paid into court. If the order or decree appealed from in the instant case were affirmed, the complainants, Coon, could not get their money without some further suit unless Shapiro should voluntarily pay it.

The order or decree appealed from is reversed and the matter remanded to the Circuit Court with directions to confirm the decree of foreclosure.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. CONCURS;
THOMSON, J. SPECIALLY CONCURRING:

In my opinion the decree of the Circuit Court

in declaring the writs indefeasible due on account of the
failure to pay the semi-annual interest falling due June
1st, 1923, but they seek to be relieved from the payment of
master's fees and other costs and the award sanctioned them
in this connection. But we are of the opinion that the de-
cree should not have been vacated or set aside and the writ
dismissed because it appears from Shapiro's own testimony
that what the defendant Levinson did in the matter of pay-
ment of the interest was done as Shapiro's representative.
Levinson who was a lawyer and is brother-in-law, is
hereby it was expressly agreed between him and Levinson
that the payment of the interest should be taken care of
by Levinson, therefore, that the contract of Levinson in insist-
ing that there was no default in the payment of the interest,
was the contract of Shapiro, and be having been defeated in
that suit by the decree, which was affirmed by this court,
he is in no position now to make that the mortgage's fees
and other costs ought to be taxed against him. Nor was the
court warranted in dismissing the suit, in any event, without
requiring the money to be paid into court. If the order or
decree appealed from in the instant case were affirmed, the
complainants, then, could not get their money without some
further suit unless Shapiro should voluntarily pay it.

The order or decree appealed from is reversed and
the matter remanded to the Circuit Court with directions to
overrule the pleas of limitations,

REVERSED AND REMANDED WITH DIRECTIONS.

LEWIS, P.J. and SCANLAN and
TAYLOR, J.J. concur.

should be reversed and the cause remanded to that court with directions to require the Shapiros to bring into court, for payment to the complainants, not only the principal and interest due on the mortgage down to date, but all costs including master's fees, for the reasons given in the foregoing opinion; and upon failure of their so doing within the time specified by the court, that the decree of foreclosure be confirmed.

939

111 - 30939

LOVERA COTTON MILLS, INC., a corp.,

Appellant,

v.

AMERICAN INSULATED WIRE & CABLE CO., a corp.,

Appellee.

243 I.A. 628

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover a claimed balance of $10,366.38, for yarn sold and delivered to the defendant. The defendant denied that it owed plaintiff any sum, but by way of a counter-claim or setoff, claimed a balance due from the plaintiff of $33,915.75, which, on the trial, was increased to $33,915.75. The case was tried and there was a verdict and judgment in the defendant's favor for $7130.13.

Plaintiffs' claim was for the unpaid balance of the purchase price of three quantities of yarn sold and delivered by it to the defendant, one sale being made in May, one in August and one in September, 1920. To plaintiffs' statement of claim the defendant filed its affidavit of merits wherein it sets up that it bought a large quantity of yarn from plaintiff including that mentioned in plaintiffs' statement of claim, but averred that the yarn was not of the quality purchased and further that it was improperly wound on tubes so that it could not be used to advantage by the

Original filed Dec. 23, 1940.

defendant; that as a result of this $18,915.75 worth of yarn was unfit for use and became so much waste. It was further set up in the affidavit of merits that as a result of the defective yarn, the defendant was damaged $5,000.00 by reason of the stoppage and delay in the operation of its machinery. On the trial this item was by leave of court, increased to $15,000.00, so that the defendant's claim of setoff aggregated $33,915.75. To defendant's claim of setoff plaintiff filed an affidavit of merits denying that there was any defect in the yarn and denying that defendant had been damaged in any amount on account of the defective character of the yarn. On the trial of the case plaintiff, by leave of court, eliminated three items from its claim aggregating $989.07, leaving its entire claim - $9477.31 - based on the yarn it had sold to the defendant on September 7, 1926. This was done by plaintiff in an attempt to prevent the defendant from offering any evidence tending to show any damage it had suffered except under the contract of sale of September 7, 1926, plaintiffs' position being that since defendant's claimed damages were unliquidated, the evidence should be confined to the contract of September 7th. The court did not agree with plaintiff, but allowed the defendant to put in evidence touching its setoff without limiting it to the contract of September 7, 1926. Near the close of plaintiffs' case counsel for the defendant admitted that it had received from the plaintiffs the yarn in question as set up in plaintiffs statement of claim and that the amount still unpaid was $10,386.38.

On the trial the defendant offered evidence, in

support of its setoff or counter-claim, tending to show that the yarn it had received from plaintiffs was defective; that it was improperly wound on the tubes; that it made complaint of this fact from time to time to the plaintiff, and that the plaintiff had agreed to make good any damage defendant might sustain. Defendant further offered evidence tending to support its claim that it had been damaged to the extent of $15,000.00 on account of its inability to properly operate its factory which was occasioned by the defective yarn, because when the yarn broke it was necessary to stop the machines and defendant was thereby damaged. On the other hand, plaintiffs offered evidence tending to show that the yarn was not defective, and that it was not improperly wound on the tubes. We are, however, of the opinion that the evidence discloses that some of the yarn was defective and that some of it was improperly wound on the tubes.

The defendant in an endeavor to prove the amount of its damage on account of the defective yarn offered evidence to the effect that it had complained to plaintiff about the quality of the yarn; that plaintiff had admitted that the yarn was not as it should have been, told the defendant to keep track of the amount of such defective yarn and that plaintiffs would make an allowance to the defendant for it. A witness for the defendant testified that the parties had endeavored to reach an amicable agreement as to the amount of the allowance that should be made by the plaintiffs to the defendant; that plaintiff offered $1500.00, which the defendant refused and that the defendant made a counter-proposition that it be allowed six cents

per pound for 42,000 pounds or $2520.00, and that plaintiffs refused the counter-proposition.

The defendant also offered evidence tending to show that Harris, one of its employes had been instructed by it to weigh the defective yarn, as it was discarded, keeping an account of the poundage from day to day; that Harris from day to day made out tickets showing the number of pounds of the defective yarn per bale. These tickets were produced on the trial. Harris who had done the weighing had died prior to the trial. A witness for the defendant testified that he took the tickets which were turned in by Harris and which were identified on the trial as being in Harris' handwriting and dictated to a stenographer a statement from them and from other information which he had concerning the yarn. These statements purport to show the number of each bale or package, the gross, tare and net weights, also the percentage of loss and the number of pounds claimed to be lost on each bale as well as the total loss figured at so much per pound. The witness testified that the number of pounds claimed to have been lost as shown by these statements were taken from the tickets prepared by Harris. These statements were admitted in evidence over plaintiff's objection and they cover about twenty pages of the abstract. They tend to show that there was a loss on each of the 325 packages. or bales.

The defendant's evidence further tends to show that a witness was present when Harris weighed out three or four of those packages and that the amount of loss on those three or four packages was as indicated on the tickets prepared by Harris. As to the loss claimed on the remaining 320 bales,

no one saw the weighing that was done by Harris, and of course, no one was able to testify that the tickets prepared by Harris and which purported to show the number of pounds lost was correct. So that there is no evidence in the record as to the number of pounds of yarn that was defective, although the defendant's claim for this item is $18,915.75. Unless the statements in the record which were prepared by a representative of the defendant as above stated were properly received in evidence, the judgment cannot stand. This is conceded by both parties. But the defendant contends that the statements were properly received, because they were original entries in the nature of a book of account; that the memoranda or statements "were made contemporaneously with the discovery of the defective condition of the yarn, and its rejection, and as such were properly admissible as a part of the res gestae." We think neither of these contentions can be sustained. The memoranda or statements can in no sense be considered in the nature of a book account. They were not made in the regular course of business between merchants, but were made by the defendant with a view of making a claim of setoff against the plaintiffs. Of course, the defendant could not make evidence in this manner for itself and recover the amount it claimed without any evidence that the claimed shortage was correct, and there is no such evidence in the record.

From an early date it was a custom to receive the shop books of "divers men of trades and handicraftsmen" in evidence as an exception to the hearsay rule and this was to whether the person who made the entries was living

or dead. There was more or less abuse of this and the whole proceeding was discredited as it involved the making of evidence for one's self. But it was later held that the book entries of a deceased clerk were admissible in evidence on the ground of necessity, provided they appeared to be trustworthy, and that it also appeared that the entries were made in the regular course of business as a part of a system of entries and were made at a time when there was no motive to misrepresent. Sections 1518, 1522, 1523, 1525 and 1537, 3 Wigmore on Ev. 2nd Ed.

Sec. 3, Chap.51, Cahill's statutes provides that in any civil action or suit where the claim or defense is founded on a book account, any party interested may testify to his book account; that it is a book of original entries and that the entries are true; or if the entries were made, by a person since deceased, in the usual course of trade, that the books and entries may be admitted in evidence. This section does not change the law materially from that announced by Wigmore, supra. The statements prepared by the defendant and offered in evidence tending to show its loss cannot be considered a book account under the statute. They were but memoranda prepared by the defendant with a view of making a claim against the plaintiffs, because it was claimed the yarn was not of the quality purchased, - that there was a breach of warranty on the part of the plaintiff and the memoranda was prepared by the defendant to show the amount of defendant's damages occasioned by such breach. The president of the defendant company testified that in the use of the yarn, when defective yarn was found, it became waste, was

thrown on the floor and burned the following morning. Defendant's own evidence, which is uncontradicted, shows that in an endeavor to reach an adjustment between the parties on account of the defective yarn, plaintiff offered to pay the defendant $1500.00 and that the defendant made a counter-proposition of settlement for $2520.00. And yet it claimed on the trial that the damage it suffered on account of defective yarn was $23,915.75. From this uncontradicted evidence, we think that the statements or memoranda in the record lack trustworthiness, which Professor Wigmore says is a necessary pre-requisite to the admission of such memoranda in evidence. We are also of the opinion that the memorandum did not come within the law as announced by Professor Wigmore in the sections above cited. The entries made upon the tickets cannot be considered to have been made in the regular course of business as a part of a system of entries nor were they made until after a controversy had arisen between the plaintiff and defendant over the yarn.

To the contention of the defendant that the memoranda, were properly admissible "as part of the res gestae", we think the memoranda, considering the method under which it was prepared was not admissible in any view of the case. In considering the question of the admissibility of evidence on the ground that it was admissible as part of the res gestae, in the case of Martin v. Rurek, 287 Ill. App. 379, we quote with approval from section 1795 of Vol. 3 of Wigmore on Evidence. Professor Wigmore there says that "no rule of evidence can be created or applied by the mere muttering of a shibboleth" and that the phrase res gestae should never be mentioned because it is a "vicious element in our legal phraseology."

Plaintiff contends that if we hold that the memoranda offered by the defendant in support of its claim be rejected, then the judgment should be reversed and judgment entered in this court for the amount of plaintiff's claim which was admitted to be due on the trial. But we think we would not be justified in so doing in view of the fact that it appears from the record that some of the yarn was defective and that plaintiff offered to pay defendant $1500.00 on account of such defective yarn. Moreover, the decision was in defendant's favor on the basis of a certain exhibit which we now hold was not admissible. The defendant should not be precluded from an opportunity of presenting other proof, if it has any.

On the trial considerable was said by the court and counsel as to whether the witness might refresh his recollection by first examining the memoranda which we hold were erroneously admitted in evidence, and since there must be a re-trial of the case, we think we ought to say that it is obvious that this memoranda could not be used by the witness to refresh his recollection, because he had no recollection of the facts stated in the memoranda, - he knew nothing about it. There was no time when he could say of his own knowledge that the facts recorded on the memoranda were true and correct.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, J. SPECIALLY CONCURRING:

I concur in the decision of this case, but not in what is said in the foregoing opinion on the question of res gestae.

TAYLOR, P.J. DISSENTING:

The evidence shows that some time in June, 1920, the matter of the yarn being defective was taken up by representatives of the plaintiff and the defendant; that on that occasion, according to the testimony of Breamner, President of the defendant, there were present, besides himself, Mervis, Secretary of the defendant, Simond, sales agent for the plaintiff, and Flynn, Superintendent of the defendant; that they, on that occasion, went out into the mill and saw one of the machines at work; that on that occasion Simond said, "I regret that the yarns run as bad as they do run. It is terrible. I don't know what I can do, but I will take it up with the mills and call their attention to it". Breamner testified there was another meeting at which the same parties were present, including Phillips, Manager and Vice-President of the plaintiff; that on that occasion they went out to the machines, or spoolers, as they were called, and watched them work; that he asked Phillips and Simond, on that occasion, in the presence of Mervis and Flynn, "What are you going to do with this yarn?"; that the answer of Phillips was as follows: "Mr. Breamner, my advice to you is to use as much as you can, get as much usable cotton out of it as you can, keep track of the waste, and we will reimburse you for your loss. We will not allow you to suffer a dollar's worth." Mervis testified that Phillips and Simond both requested that the defendant keep on running the yarns and promised that the plaintiff would make proper adjustment.

The evidence shows quite obviously that in the summer of 1920, it was well understood by both parties that the yarn was seriously defective. The evidence also shows, and it is

not denied, that while the dispute was on and both parties were endeavoring to come to an understanding as to what should be done, Phillips, Manager and Vice-President of the plaintiff, advised Breamner, President of the defendant, to use as much of the yarn as he could, andkeep track of the waste," and that plaintiff would reimburse the defendant for its loss. That being the evidence and the defendant undertaking, in order to make out its case on its set-off, to offer in evidence the data which it had, and which it had created, following the advice of Phillips to "keep track of the waste," it does not lie in the mouth of the plaintiff, in view of its understanding with the defendant, to urge that the data kept by the defendant pursuant to the advice of the manager of the plaintiff to the president of the defendant, to stultify itself and repudiate the understanding, and ask that the data so offered by the defendant should be kept out, simply because it was, in and of itself, not such evidence as would be ordinarily admissible under the rule as to book accounts, or the rule as to hearsay. The evidence should have been admitted for what it was worth. It came into being as the result of a mutual understanding between the plaintiff and the defendant. In a sense, the defendant was the agent of the plaintiff in keeping the data in question. That being the case, the understanding of the parties became paramount, and the evidence admissible for what it was worth.

The pepresentatives of the plaintiff and the representatives of the defendant had met, and, like sensible business men, undertook to consider the difficulties that

had arisen, and parted with the understanding, at the suggestion of the representative of the plaintiff, that in order, in the end, to determine the loss of the defendant, if any, that the very evidence offered should be brought into being by the defendant.

In my judgment, the evidence as offered was admissible. What it proved, when admitted, would be a question of fact for the jury, or trial judge.

308 - 31027

MADELINE McCORMICK,
Appellee,

v.

JAMES M. McCORMICK,
Appellant.

243 I.A. 628

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

An order was entered by the Superior Court of Cook County in the divorce proceedings brought by Madeline McCormick against her husband James M. McCormick, ordering that he pay to her $100.00 as and for her solicitor's fees in defending the appeal in this court in the case of McCormick v. McCormick, No. 31036, in which case we have this day filed an opinion. The order also required the defendant to pay $100.00 to the complainant on account of court costs and expenses in defending the appeal. The defendant appeals from this order, but we think the order was warranted under the law. Ozarra v. Ozarra, 128 Ill. App. 430; Gehlbach v. Gehlbach, 219 Ill. App. 503; Lehmann v. Lehmann, 225 Ill. App. 513; Stillman v. Stillman, 99 Ill. 196. These cases are to the effect that a divorced wife is entitled to an allowance for solicitor's fees in seeking to compel the payment of alimony decreed to her in the divorce decree, and we think the cost of the appeal falls within the same rule of law.

The order appealed from is affirmed.

AFFIRMED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

An order was entered by the Superior Court of Cook County in the divorce proceedings brought by Madeline Mackenzie against her husband James R. Mackenzie, ordering that he pay to her $100.00 we and for her solicitor's fees in defending the appeal in this court in the case of Mackenzie v. Mackenzie, No. 21028, in which case we have this day filed an opinion. The order also required the defendant to pay $100.00 to the complainant on account of court costs and expenses in defending the appeal. The defendant appeals from this order, but we think the order was warranted under the law. Cheney v. Cheney, 196 Ill. App. 490; Perkins v. Perkins, 212 Ill. App. 508; Lehmann v. Lehmann, 252 Ill. App. 214; Phillips v. Phillips, 69 Ill. 136. These cases are to the effect that a divorced wife is entitled to an allowance for solicitors' fees in resisting to compel the payment of alimony decreed to her in the divorce decree, and we think the cost of the appeal falls within the same rule of law.

The order appealed from is affirmed.

AFFIRMED.

243 I.A. 628

220 - 31039

CARLSON FUEL AND SUPPLY CO., a corporation,

Appellant,

v.

JAMES L. MUNGER AND JAMES T. MUNGER,

Appellees.

243 I.A. 628

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On January 5, 1925, a judgment for $1262.65 was entered by confession in favor of plaintiff and against the defendants in the Superior Court of Cook County. The judgment was entered on a promissory note. Afterwards the defendants moved that the judgment be opened up and they be given leave to defend. The motion was supported by affidavits and an order was entered allowing the motion, the judgment to stand as security. It was further ordered the original note filed in the cause be impounded with the clerk of the court. By leave of court given them the defendants filed three pleas: first, the general issue; second, that they did not deliver the note mentioned in the declaration; and third, that there was no consideration forthe note. The case came on for trial on December 23, 1923, and by agreement of the parties, the cause was submitted to the court for trial without a jury. The court found the issues for the defendant, vacated and set aside the judgment, dismissed the suit and the plaintiff appeals. Afterwards upon

CARLSON FUEL AND SUPPLY CO.,
a corporation,

Appellant,

v.

JAMES E. MORGAN AND JAMES F. MORGAN,

Appellees.

Appeal from

DOOR COUNTY.

Opinion filed Dec. 29, 1938.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On January 5, 1938, a judgment for $1250.00 was entered by confession in favor of plaintiff and against the defendants in the Superior Court of Door County. The judgment was entered on a promissory note. Afterwards the defendants moved that the judgment be opened up and they be given leave to defend. The motion was supported by affidavits and an order was entered allowing the motion, the judgment to stand as security. It was further ordered the original note filed in the cause be impounded with the clerk of the court. By leave of court given when the defendants filed three pleas: first, the general issue; second, that they did not deliver the note mentioned in the declaration; and third, that there was no consideration therefor. The case came on for trial on December 20, 1938, and by agreement of the parties, the cause was submitted to the court for trial without a jury. The court found the issues for the defendant, vacated and set aside the judgment, dismissed the suit and the plaintiff appeals. Afterwards upon

a petition being filed by plaintiff an order was entered that the clerk of the court should "insert in said common law record the original note."

The defendants contend that there is no proper bill of exceptions in the record, for the reason that it does not appear that the purported bill of exceptions was approved by the trial judge and furthermore, that even if the bill of exceptions should be held to be properly in the record, it only pertains to the hearing on the motion to open up the judgment and not to what occurred upon the trial of the cause. Neither of these contentions is sustained by the record but is contrary to the record. The bill of exceptions contains the following: "The foregoing bill of exceptions is presented by plaintiff for the court's approval and signature and for filing by plaintiff, this 30th day of January, 1936." Then follows the signature of the trial judge. This specifically states that it was presented to the judge and approved, and the judge signed it. Moreover, on the same day an order appears of record that the bill of exceptions being presented to the court for approval was duly signed, sealed and ordered filed. And there also appears following the bill of exceptions, a stipulation stating that "the original bill of exceptions heretofore approved and filed" may be incorporated into the record in lieu of a copy thereof. It also appears that prior to the oral argument of the cause, the defendants made a motion to strike the bill of exceptions from the record which was denied. The bill of exceptions purports to cover not only the matters occurring on the motion to open up the judgment, which was March 7, 1935, but also

a petition being filed by plaintiff an order was entered
that the clerk of the court should "insert in said causes
law record the original bond."

The defendants contend that there is no proper bill
of exceptions in the record, for the reason that it does not
appear that the purported bill of exceptions was approved by
the trial judge and furthermore, that even if the bill of
exceptions should be held to be properly in the record, it
only pertains to the hearing on the motion to open up the
judgment and not to what occurred upon the trial of the
cause. Neither of these contentions is sustained by the
record but is contrary to the record. The bill of exceptions
contains the following: "The foregoing bill of exceptions
is presented by plaintiff for the court's approval and
signature and for filing by plaintiff, this 30th day of
January, 1928." Then follows the signature of the trial
judge. This specifically states that it was presented to the
judge and approved, and the judge signed it. However, on the
same day an order appears of record that the bill of exceptions
being presented to the court but approval was duly signed,
sealed and ordered filed. And there also appears following
the bill of exceptions, a stipulation stating that "the
aforesaid bill of exceptions hereinbefore approved and filed"
may be incorporated into the record in lieu of a copy thereof.
It also appears that prior to the oral argument of the cause,
the defendants made a motion to strike the bill of exceptions
from the record which was denied. The bill of exceptions
purports to cover not only the matters occurring on the motion
to open up the judgment, which was March 7, 1928, but also

on the hearing of the cause, December 3, 1925.

When the matter came on for hearing the record discloses that counsel for defendant stated to the court that the only question involved was one of law and not of fact and this was agreed to by counsel for plaintiff. The record then discloses that there was some discussion between the court and counsel as to whether the plaintiff or the defendants should first offer evidence. The court held that this burden was upon the defendant, and thereupon the record discloses that counsel for the defendants read the note in evidence to the court. The court held that the note on its face was not ambiguous, that it was the note of a corporation and not of the defendants, and thereupon the judgment was set aside. The issues were then found for the defendants and judgment entered accordingly. We think that the note on its face is ambiguous and evidence should have been produced. The note is on the ordinary printed form and is for $1100.00, dated October 24, 1924, due sixty days after date to the order of the plaintiff. Below the printed power of attorney there are two lines for signatures. Above these two lines appears the following, which is stamped by a rubber stamp, most of it in the printed matter on the note: "J. L. Munger & Bros., Inc.

By_____Pres.- Treas."

No name is on the blank line stamped on the note, which was to be signed by the person who was president and treasurer of the corporation. Below on the first blank line of the note appears the name of James L. Munger, and the second line that of James T. Munger. As stated these lines are in the usual place for the signature of makers of the note. At the left

on the hearing of the cause, December 3, 1888.

When the matter came on for hearing the record disclosed that counsel for defendant stated to the court that the only question involved was one of law and not of fact and this was agreed to by counsel for plaintiff. The record then disclosed that there was some discussion between the court and counsel as to whether the plaintiff or the defendants should first offer evidence. The court held that this burden was upon the defendant, and thereupon the record discloses that counsel for the defendants read the note in evidence to the court. The court held that the note on its face was not ambiguous, that it was the note of a corporation and not of the defendants, and thereupon the judgment was set aside. The issues were then found for the defendants and judgment entered accordingly. We think that the note on its face is ambiguous and evidence should have been produced. The note is on the ordinary printed form and is for $1500.00, dated October 26, 1884, due sixty days after date to the order of the plaintiff. Below the printed words of attorney there are two lines for signatures. Above these two lines appears the following, which is stamped by a rubber stamp, most of it in the printed matter on the notes "J. T. Munger & Bros., Inc.

By _____ Pres."

No name is on the blank line stamped on the note, which was to be signed by the person who was President and Treasurer of the corporation. Below on the first blank line of the note appears the name of James T. Munger, and the second line that of James T. Munger. As stated these lines are in the usual place for the signature of makers of the note. At the left

end of the note appears the impression of the corporate seal of J. L. Munger & Bros., Inc.

Whether this note was to be signed by the three parties, viz. the corporation by its president and treasurer and by the two defendants, we are unable to say from the face of the note itself. And while the cause was submitted to the court for decision by both parties on the face of the note, yet we think we would not be justified in affirming the judgment.

As to whether upon a trial of the case plaintiff or defendants should be first required to proceed with their evidence, we think we ought to say that the question is not free from doubt, but in the interest of uniformity, we think the plaintiff should be required to produce its evidence first. Morris v. Taylor, 199 Ill. App. 588; Cohen v. Rosenthal, 207 Ill. App. 331.

The judgment of the Superior Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

and of the note opinions the impression of the conference
many of T. I. Hunger & Sons, Inc.

Whether this note was to be signed by the three
parties, viz. the corporation by its president and treasurer
and by the two defendants, we are unable to say from the
face of the note itself. And while the cause was submitted
to the court for decision by both parties on the face of the
note, yet we think we would not be justified in affirming
the judgment.

As to whether upon a trial of the case plaintiff
or defendants should be first required to proceed with
their evidence, we think we ought to say that the question
is not free from doubt, but in the interest of uniformity
we think the plaintiff should be required to produce its
evidence first. Hoffer v. Dwelle, 124 Ill. App. 244; Lyons v.
Greenthal, 241 Ill. App. 321.

The judgment of the Superior Court of Cook County
is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

249 - 31069

EDWARD A. BOWEN,
Appellee,

v.

LOUIS FRIEDMAN,
Appellant.

243 I.A. 628

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of attachment against the defendant, claiming $865.00 due as real estate broker's commission, and the Chicago Title and Trust Company was served as garnishee. Afterwards the garnishee was discharged and an order entered that the plaintiff's affidavit for attachment stand as his statement of claim and the defendant was ruled to file an affidavit of merits. The defendant filed its affidavit of merits. Up to this point the orders had been entered by Judge Finnegan, the last one being on December 31, 1925. The case then came before Judge Lyle, and on the 13th of January, 1926, the defendant filed a petition asking for a change of venue from Judge Lyle, or that the cause be transferred to another judge. The motion was denied. Thereafter the case was heard on January 18, 1926 and there was a verdict and judgment in favor of plaintiff for $600.00 and the defendant appeals.

The defendant's abstracts and briefs were filed in this court on June 2, 1926, and thereafter counsel for plaintiff made numerous motions for an extension of time

EDWARD V. MOORE,

Appellee,

v.

FLORIA ENTERPRISES,

Appellant.

ANDREW THOM

MUNICIPAL COURT

OF CHICAGO.

2431-A. 6528

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of attachment against the defendant, claiming $600, due on real estate broker's commission, and the Chicago Title and Trust Company was served as garnishee. Afterwards the garnishee was discharged and an order entered that the plaintiff's affidavit for attachment stand as his statement of claim and the defendant was ruled to file an affidavit of merits. The defendant filed its affidavit of merits. On the 4th day the order had been entered by Judge Linnegan, the last one being on December 21, 1925. The case then came before Judge Lyle, on the 12th of January, 1926, the defendant filed a petition asking for a change of venue from Judge Lyle, on that the cause be transferred to another judge. The motion was denied. Thereafter the case was heard on January 18, 1926 and there was a verdict and judgment in favor of plaintiff for $600.00 and the defendant appeals.

The defendant's abstracts and briefs were filed in this court on June 8, 1926, and thereafter counsel for plaintiff made numerous motions for an extension of time

for filing briefs and they were allowed. The last of such orders was entered November 3, 1926, and at that time the order of this court extended the time within which plaintiff might file his brief to November 13, 1926, but no brief has been filed. The petition for a change of venue made by the defendant is in the record and appears to conform with the requirements of the statute, and this being true, the court was without discretion in the matter and could not no further except to enter an order granting the prayer of the petition for the change of venue. And this is so even if the statements contained in the petition for a change of venue were not true. Woodhull v. Kelly, 10 Ill. App. 486; Knickerbocker Insurance Co. v. Tolman, 80 Ill. 106; Walsh v. May, 38 Ill. 31; People v. Merchants Bridge Co., 283 Ill. 408. Where a petition for a change of venue is filed in accordance with the statute no evidence can be introduced to contradict the averments of the petition. Woodhull v. Kelly, supra.

For the error in refusing to grant the change of venue, the judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to grant the prayer of the petition.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

276 - 31096

M. A. SIMON,

Appellee,

v.

ROBERT BOLLEI AND EDWARD SISSON, doing business as Bollei & Sisson,

Appellants.

243 I.A. 629

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendants to recover $438.75, which he claimed was due him for services rendered in bringing about the exchange of two pieces of real estate. The case was tried before the court without a jury and there was a finding in plaintiff's favor for $436.35, and the defendants appeal.

The record discloses that the defendants were real estate brokers engaged in their business in Chicago, and about the first of June, 1925, they employed the plaintiff to assist them in their business and he obtained from the State of Illinois a real estate broker's license. The defendants say that it was agreed between plaintiff and defendants that if any real estate plaintiff should bring into the office for sale was afterwards sold by the defendants, plaintiff would receive 20 percent of the commission but if such property were sold by plaintiff, he would receive 50 percent of the commission. On the other hand,

Ordered filed Dec. 29, 1894.

plaintiff apparently contends that his agreement was that he would receive one-half of the commission whether such property were sold by him or by the defendants.

The record discloses that shortly after plaintiff went to work he was successful in inducing Dr. Korssell to permit plaintiff to list a piece of property, owned by the doctor, for sale. The property was accordingly listed in defendant's office, and shortly thereafter an exchange of this property for property belonging to one Miller was made. The Miller property had sometime prior to this date been listed by him with the defendants for sale. The defendants received $450.00 commission from Dr. Korssell and $412.50 from Miller. In order to effect the exchange, the defendants were required to obtain a loan secured by a mortgage on Dr. Korssell's property for $6,000.00 and for doing this, they received a small sum of money in addition to the commission. And plaintiff claims that he was entitled to one-half of what defendants received in the entire transaction.

Plaintiff's version of the agreement between him and the defendant, as he testified, was that he talked with the defendants about June 10, 1925 and asked them what compensation he was to receive "out of any deals I made", and that the defendant Sisson replied, "I was to get fifty per-cent of any deal I brought in the office, whether it was a trade or whether it was a straight sale" and that plaintiff stated that this was satisfactory to him and that he then started to work for them. He further testified that where

—

he obtained the listing of buildings for sale, he was to receive 20 percent of the commission payable "when somebody else sells the building". But on re-direct examination he was asked this question: Q. In the event that a building was sold and you procured the listing, what was the basis. A. 50 percent. He was called again on rebuttal and testified on cross-examination that "he had nothing to do with Mr. Miller", in making the deal between Miller and Dr. Korsell. He also testified that the defendants offered him $90.00 or 20 percent of the $450.00 commissions which the defendants had received from Korsell, which he refused; that later defendants offered him a draft which was for about $270.00, but that he refused that also. One of the defendants testified he did offer the plaintiff a draft for about $270.00, but that a part of this was for an advance made to plaintiff who desired to purchase a Ford automobile. The other defendant was erroneously not permitted to testify in reference to what was said at the time this draft was tendered.

The defendant contends that the judgment was wrong and should be reversed because plaintiff failed to prove that he had a real estate broker's license issued by the City of Chicago and that it was not enough merely that he had a real estate broker's license from the State of Illinois. We think this question is immaterial, (although plaintiff alleged in his statement of claim that he was licensed real estate broker)for the reason that in the instant case plaintiff is not as a matter of fact seeking to recover a broker's commission, but his suit is based upon a promise made by the defendants to pay him a part of the commission which they

received. He was acting more in the nature of a solicitor for business than that of a real estate broker. Gross v. Strauss 208 Ill. App. 363. We, therefore, hold that plaintiff under the facts in this case was not required to be a licensed real estate broker. Moreover, while counsel for both parties have argued in their briefs the provisions of the city ordinances requiring licenses for real estate brokers, yet since the ordinances are not in the record, the question is not properly before us. This court does not take judicial notice of ordinances.

We think it appears from all the evidence without dispute that plaintiff was to receive 20 percent of the commission in case he succeeded in listing property with the defendants for sale, and that if plaintiff sold such property, he would receive 50 percent of the commissions. It further appears from the evidence, which is also undisputed, that plaintiff succeeded in listing Dr. Korssell's property with the defendants, but that he did not obtain a purchaser for it, but on the contrary, the defendants secured Miller and the exchange of the property was thus made. In this state of the record, it follows that plaintiff was only entitled to 20 percent of the commission received by the defendants from Dr. Korssell. He was entitled to no part of the commission received by the defendants from Miller, nor was he entitled to any part of the commission received for the negotiation of the loan. He testified he did nothing to induce Miller to make the exchange, except that he rode out in an automobile with Dr. Korssell when one of the defendants showed the doctor through Miller's building. Upon a careful consideration of all the evidence, we are clearly of

the opinion that the most that plaintiff is entitled to in this case is 20 percent of $450.00 or $90.00.

The judgment of the Municipal Court of Chicago will, therefore, be reversed with a finding of fact and as a jury was waived, judgment will be entered in this court in favor of plaintiff and against the defendant for $90.00.

JUDGMENT REVERSED WITH A FINDING OF FACT AND JUDGMENT ENTERED IN THIS COURT.

FINDING OF FACT:

We find as a fact that the defendant was not entitled under the evidence to receive any part of the commission paid by Miller or that received by the defendants on account of the making of the loan and only 20 percent of the commission defendants received from Dr. Kerasell.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

385 - 31105

GEORGE ASPIS,
Appellee,

v.

ALFRED POLENSANI,
Appellant.

243 I.A. 629

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages for personal injuries. There was a verdict and judgment in his favor for $1,000.00 and the defendant appeals.

The record discloses that about seven o'clock in the evening of January 5, 1924, just after plaintiff had alighted from an east bound street car in Division Street which stopped at the west side of Hoyne Avenue, he was struck and injured by an eastbound automobile and was severely injured. The defendant filed a plea of general issue and a special plea denying that it owned and operated the automobile which struck and injured the defendant.

In this court counsel for the defendant state that they do not question the negligence of the driver of the automobile, nor do they contend that plaintiff was guilty of any negligence, and that they raise no question as to the amount of the verdict and judgment. But their contention is

Opinion filed Dec. 29, 1958.

as stated by counsel, "that there is no evidence in the record justifying a jury in finding that the defendant owned the automobile and that Andrew Murray (driver of the car) was an agent of the defendant at the time and place of the accident, acting in the course and scope of the defendant's business, or on any mission for the defendant."

The record discloses that the defendant at and prior to the time in question, lived at No. 1813 West Berteau Street, Chicago and was engaged in the cartage business, hauling building material, and for this purpose used three automobile trucks. He had also owned the Chevrolet touring car which struck and injured plaintiff; that Andrew Murray, the driver of the touring car, had been employed by the defendant, off and on for about a year and a half prior to the accident as a truck chauffeur. The accident occurred on Saturday evening and all of that week, except Saturday, Murray had worked for the defendant. The testimony of the defendant is that Murray did not work for him on Saturday, because it was extremely cold weather and the defendant did no business on that day; that Murray was paid 65 cents per hour for the work, and that his hours were from seven o'clock in the morning until five o'clock in the afternoon. The undisputed evidence further shows that in the forenoon of the day of the accident, Murray drove the Chevrolet touring car, taking the defendant to a funeral; that about four o'clock on the afternoon of that day, Murray drove the defendant home to receive his weeks pay. And the defendant testified that he then paid Murray for that week, excluding Saturday, because the defendant had done no work on that day. And he further

testified that when Murray was leaving after receiving his pay he requested Murray to take some tickets to the National Brick Company on account of some hauling that had been done and that Murray left with the tickets. The evidence further shows that later in the evening shortly after the accident, defendant received a telephone call advising him of the accident.

It further appears from the evidence that immediately after the accident Murray was placed under arrest and on the following Monday morning the defendant went to the police station to see him, but he testified he did not go into the court room where Murray was to have a hearing. The defendant further testified that he did not own the automobile on the day of the accident, but had sold it about a week before to Murray, who at the time of the purchase had paid the defendant $150.00 or $200.00; that he did not remember which amount; that he sold the car to Murray for $360.00 or $365.00; that when Murray bought the car, he wanted to pay so much a week, but that defendant insisted upon Murray giving him notes and that Murray gave him five notes for $35.00 each. No such notes were produced at the trial. The car was kept in the garage next door to the defendant's home where he kept his trucks; that it had remained in the garage up to January 5th and the evidence shows that Murray took it from the garage on the morning of that day. The evidence further shows that the defendant had obtained a license from the Secretary of State to operate the Chevrolet for the year 1923. It further appears that two days after the accident, January 7, 1924, an application for a license was filed with the Secretary of State by Murray's wife. At the time of the accident, the license for 1923 was

still on the car. Neither Murray or Mrs. Murray were called as witnesses, although the evidence tends to show that Murray could have been subpoenaed if the defendant had desired to have him called.

The evidence further shows that the defendant lived at No. 1813 Berteau Street, which is more than two miles north of Murray's home; that the foreman of the company to whom Murray was to deliver the tickets was a few blocks southwest from where Murray lived and that the place of the accident was about a mile southeasterly of where Murray lived. There is other evidence in the record which we think it unnecessary to further detail here, but it is sufficient to say that from a careful consideration of all the evidence in the record, we are clearly of the opinion that the question of whether defendant owned the automobile and also the question of whether Murray was driving the automobile at the time of the accident for the defendant was a question of fact for the jury. Upon a careful consideration of all the evidence in this respect, we are also of the opinion that we would not be warranted in disturbing the verdict on the ground that it is against the manifest weight of the evidence. While defendant's testimony was not directly contradicted, the question of its credibility was for the jury. There are many things in the record that tends to discredit the testimony of the defendant as to the sale of the car by him to Murray, and as to what Murray was doing on the day of the accident. It appears from defendant's own testimony that, although Murray did not work on the day of this accident, driving one of defendant's trucks, because of the extreme cold, and

although he was paid by the hour for the time actually put in, he was in defendant's employ, not only for some months prior to the time of this accident, but for six months or more after it. It was clearly a question for the jury to pass upon all the evidence, facts and circumstances in deciding the issues involved. From what we have said it is obvious that there is no merit in the defendant's contention that there should have been a directed verdict at the close of the case as he requested.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

84 - 30901

THE RADIOPHONE BROADCASTING CORPORATION, (a corp.)

Appellant,

v.

BOWLES LIVE STOCK COMMISSIONERS COMPANY, a corp., et al,

Appellees.

243 I.A. 629

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

In case No. 30902, in this court, Bowles Live Stock Commission Company v. The Chicago Live Stock Exchange, et al, in which case we are this day filing an opinion, we have set forth all the facts and circumstances involved in the controversy between the parties to the case at bar, and it will not be necessary to set them forth again in this opinion. In this case the Broadcasting Corporation filed a bill seeking to enjoin the Commission Company from ceasing to broadcast stock market information through its station, as contemplated by its contract with the Commission Company; and also seeking to enjoin the Exchange from enforcing the amendment to its Rule XXIV, prohibiting members of the Exchange from broadcasting live stock market information for advertising purposes.

As pointed out in our opinion in case No. 30902, the complainant procured a temporary restraining order in the case at bar and the motion of the Stock Exchange to dissolve that order was heard together with the application of the Commission Company for a temporary restraining order in the other case.

2437.A. 629

APPEAL FROM
CIRCUIT COURT.
DADE COUNTY.

Opinion filed Dec. 29, 1936.

MR. JUSTICE THOMSON delivered the opinion of the court.

In case No. 39CCF, in this court, Benton Life Insurance Company v. The Stock Exchange Life Insurance Company, et al., in which case we are this day filing an opinion, we have set forth all the facts and circumstances involved in the controversy between the parties to the case at bar, and it will not be necessary to set them forth again in this opinion. In this case the Broadcasting Corporation filed a bill seeking to enjoin the Commercial Company from counting to broadcast stock market information through its station, as contemplated by its contract with the Commercial Company; and also seeking to enjoin the Exchange from enforcing the amendment to its Rule XXIX, permitting members of the Exchange from broadcasting market information for advertising purposes.

As pointed out in our opinion in case No. 39CCF, the order was heard together with the application of the Commercial at bar and the motion of the Stock Exchange to dismiss that complainant procured a temporary restraining order in the case

These motions were heard on the bills filed in the respective cases and the answers thereto, pursuant to a stipulation to the effect that the allegations of fact contained in the answers should be considered as though supported by affidavits. In addition to this certain affidavits were submitted as set forth in the opinion in case No. 30902. At the conclusion of that hearing the chancellor dismissed the bill in the case at bar and entered an order continuing the temporary restraining order, pending the prosecution of an appeal from the decree dismissing the bill. Such appeal was perfected by the complainant, after which an order was entered in this court on the complainant's motion, continuing the temporary restraining order in force and effect, pending the disposition of the appeal in this court.

These two cases, one being a suit in equity by the Broadcasting Corporation and the other being a similar suit by the Commission Company, constitute an effort on the part of those two corporations to protect the contract existing between them by enjoining the Stock Exchange from enforcing its amendment to Rule XXIV. In our opinion what we have set forth in connection with our decision in case No. 30902, in the opinion this day filed in that case, likewise applies in the case at bar, and leads to the same conclusion, namely, that the chancellor did not err in dismissing the bill of complaint filed by the Broadcasting Corporation. There is an additional reason supporting that decision in the case at bar. Of course, if the Commission Company, whose officers and employees hold memberships in the Exchange, is not in a position, as we hold it is not, in the other case, to secure the relief there sought, it would follow that such relief

could not be obtained in a similar suit brought by the Broadcasting Corporation, the latter not only not being a member of the Exchange but having no such interest in or connection with the Exchange as is possessed by the Commission Company, through the memberships held by the officers and employees of the latter. The Broadcasting Corporation, not being a member of the Exchange nor entitled either directly or indirectly to any of the rights arising from membership therein, it is not in a position to complain of any of the rules adopted by the Exchange for the government of the conduct of its members, nor can it invoke the aid of a court of equity to restrain their enforcement. The American Live Stock Commission Company v. The Chicago Live Stock Exchange, 143 Ill. 210.

For the reasons we have given the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. CONCURS;
O'CONNOR, J. SPECIALLY CONCURRING:

I agree with the foregoing opinion only to the extent that the decree should be affirmed because Rule XXIV, as amended, is valid.

should not be obtained in a similar suit brought by the Broadcasting Corporation, the latter suit only has being a member of the Exchange but having no such interest in connection with the Exchange as is possessed by the Commission company, through the membership held by the officials and employees of the latter. The Broadcasting Corporation, not being a member of the Exchange nor entitled either directly or indirectly to any of the rights existing from membership therein, it is not in a position to complain of any of the rules adopted by the Exchange for the government of the members of the same, nor can it invoke the aid of a court of equity to restrain their enforcement.

The learned Vice Chancellor in his opinion, 6 Del. Ch. 112, 116 Atl. 910, says:

"For the reasons we have given the decree of the Circuit Court is affirmed."

I agree with the foregoing opinion only to the extent that the decree should be affirmed because Rule XXIV, as amended, is valid.

I agree with the foregoing opinion only to the extent that the decree should be affirmed because Rule XXIV, as amended, is valid.

147 - 30966

JAMES CERANSKI,

Appellee,

v.

JOHN JOSEFIK,

Appellant.

243 I.A. 629

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff James Ceranski, brought this action against the defendant, John Josefik and his son Joseph, to recover damages for personal injuries received when a wagon he was driving was run into by an automobile belonging to the defendant John Josefik, which at the time was being driven by his son, Joseph. After verdict, but before judgment was entered, the suit was dismissed as to Joseph, and judgment was entered against the defendant John Josefik, for $700, the jury having returned a verdict finding the issues for the plaintiff and assessing his damages at that amount. The defendant John Josefik has perfected this appeal from that judgment.

The evidence showed that the defendant father and his son were employed by the same concern and the son's work for the day was over about half an hour before that of his father. On the day in question a niece of the family of the defendant had been assisting his wife in some work about their home and when Joseph reached home from his work that afternoon, a little before five o'clock, his mother

2431.A. 629

Appellee.

Appellant.

Opinion filed Dec. 29, 1938.

that afternoon, a little before five o'clock, his mother about their home and when Joseph reached home from his work of the defendant had been assisting his wife in some way his father. On the day in question a niece of the family was over about half an hour before that of work for the day and his son were employed by the same concern and the son's

The evidence showed that the defendant father performed this errand from that judgment.

him brought at that moment. The defendant John Joselik had verdict finding the issues for the plaintiff and assessing and John Joselik, for $100, the jury having returned a so to Joseph, and judgment was entered against the defendant before judgment was entered, the suit was dismissed time was being driven by his son, Joseph. After verdict, belonging to the defendant John Joselik, which at the when a wagon he was driving was run into by an automobile county, to recover damages for personal injuries received action against the defendant, John Joselik and his son The plaintiff Agnes Grunwald, brought this

court.

MR. JUSTICE THOMSON delivered the opinion of the

told him to take his cousin home. Complying with that request from his mother, he got out the car, which was a Ford touring car, and accompanied by his two younger brothers and his cousin, he proceeded toward the home of the latter. While doing so, the collision involved in this case took place.

At the close of the plaintiff's case, the defendants moved that the plaintiff be required to elect which of the defendants he would proceed against. That motion was denied. The motion of thedefendants for a directed verdict was also denied. Both these motions were renewed at the close of all the evidence, and the court again denied them. The issues being submitted to the jury, they returned the verdict to which we have referred, and after the verdict was returned, the plaintiff's suit was dismissed as against Joseph, on the plaintiff's motion, and the court then overruled the motion of the defendant, John Josefik, for a new trial, and entered judgment against him on the verdict.

In support of the appeal it is contended that as the plaintiff's evidence disclosed the fact that he was endeavoring to hold the son, and also his father on the theory of <u>respondeat superior,</u> he could not join them in one action, and that, therefore, the trial court erred in not requiring the plaintiff to elect which one he would proceed against and todismiss the other out of the case, and that this error could not be cured after verdict, by then dismissing the case as to the son Joseph. In our opinion, that contention is unsound. When the suit was dismissed as to the son, Joseph, it was left as a suit between the

told him to take his cousin home. Complying with that request from his mother, he got out the car, which was a Ford touring car, and accompanied by his two brothers and his cousin, he proceeded toward the home of the latter. While doing so, the collision involved in this case took place.

At the close of the plaintiff's case, the defendants moved that the plaintiff be required to elect which of the defendants he would proceed against. That motion was denied. The motion of the defendants for a directed verdict was also denied. Both these motions were renewed at the close of all the evidence, and the court again denied them. The issues being submitted to the jury, they returned the verdict to which we have referred, and after the verdict was returned, the plaintiff's suit was dismissed as against the defendant, John Jowett, for a lack of jurisdiction over the person, and the court then overruled the motion of the defendant, John Jowett, for a new trial, and entered judgment against him on the verdict.

In support of the appeal it is contended that the plaintiff's evidence disclosed the fact that he was engaged in both the car, and also his father on the one occasion, and that, therefore, the trial court erred in the theory of <u>respondent superior</u>, he could not join them in one action, and that, therefore, the trial court erred in not requiring the plaintiff to elect which one he would proceed against and dismiss the other out of the case, and that this error could not be cured after verdict, by then dismissing the case as to the one Jowett. Upon objection that this contention is unsound. When the suit was dismissed as to the one Jowett, it was just as well pending the

plaintiff and the father, John, Josefik, as though the son had never been in the case at all. In our opinion Postal Telegraph & Cable Co. v. Likes, 225 Ill. 249, 265, and Lerette v. Director General of Railroads, 306 Ill. 348, support the plaintiff's contention that it was proper to permit him to dismiss the suit as to the son, after verdict, and then have judgment entered on the verdict against the father, notwithstanding the distinctions which the defendant seeks to draw between those cases and the case at bar, on the ground that here the defendant submitted motions requiring the plaintiff to elect, prior to the submission of the issues to the jury, whereas no such motions were made in the cases cited, and further, that in those cases it was not sought to hold one of the respondents on the theory of respondeat superior, while that is the situation in the case at bar. We can conceive of situations which might materially affect the question of the amount of damages to be assessed, where it might be considered error not to require a defendant, who might have been improperly joined with another, to be eliminated before the issues were submitted to the jury, but in our opinion no such situation is presented here.

The contention is made that the trial court erred in rulings involving the instructions. In one of the given instructions the court quoted the statute to the effect that "No person shall drive a vehicle of the first division as described in section 2 of this Act, upon any public highway in this State at a rate of speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb, or injure the

our opinion there was sufficient evidence in the record to make out at least a prima facie case as to the character of the locality in which this collision took place. The evidence shows that there was a double track street car line along 25th street. On cross-examination of the plaintiff by counsel for the defendant, he testified that 25th street was a "business street"; (3) the part of the Motor Vehicle Act referred to in the instruction, providing that certain circumstances shall be considered as prima facie evidence that the person operating a motor vehcile is running at a rate of speed greater than is reasonable and proper having regard to the traffic and the use of theway, or so as to injure the life or limb, or injure the property of another person, is applicable to a case such as the one at bar; (4) and (6) it was not necessary to plead the Motor Vehicle Act in the declaration. The general allegations of negligence were sufficient.
In contending the contrary the defendant relies upon the case of Horn v. Berg, 210 Ill. App. 338. The pertinent allegation of negligence in that case was contained in a count which charged that it was the duty of the defendant in driving his automobile "to look ahead and to keep said automobile under control so as to be able to stop the same in time to avoid injuring" the plaintiff, who had been a passenger on a street car and was struck by the defendant's automobile as he stepped from the front platform of the car to the street, and the count alleged that the defendant had failed in the performance of that duty and had "negligently failed to so look ahead and to keep said automobile under control," as a result of which the plaintiff had been injured. That being the allegation of negligence contained in the declaration,

the court gave the jury an instruction based upon the Motor Vehicle Act, relating to the speed at which motor vehicles may be operated on public highways, and it was contended that the court erred in giving the jury that instruction, because the declaration did not contain any allegation to the effect that the defendant's automobile was being operated at any particular rate of speed or at an unreasonable or improper rate of speed. It was held that the giving of the instruction was improper for the reason urged; this court saying that the allegation in the declaration, charging that the defendant had been negligent "in failing to look ahead and keep his automobile under control" was not "broad enough to include a violation of the statute regulating the speed of motor vehicles on public highways. The mere fact that a vehicle is not under control does not necessarily imply that it is being operated at a speed in violation of this statute." In the case at bar the negligence charged against the defendant in the declaration was that the automobile was driven "carelessly, negligently, wrongfully and improperly," because of which it collided with the plaintiff's horse and wagon and did the damage complained of. That is a much broader allegation of negligence than was contained in the declaration involved in the case of Horn v. Berg. Whereas, in that case the allegation that the defendant was negligent in failing to look ahead and keep his automobile under control, was not broad enough to imply negligence in operating it at an improper rate of speed, we are of the opinion that the charge found in the declaration involved here is broad enough to cover that element of negligence, and, therefore,

enough to prove that element of negligence," and, moreover, the charge found in the declaration imputed even if [illegible] it at an improper rate of speed," as one of the opinion that [illegible] was not proved enough to imply negligence in operating [illegible] in failing to look and keep his automobile under control," was not proved in the declaration imputed was that the defendant was negligent in [illegible] driving at an improper rate of speed. It was held that the giving of the instruction was improper for the reason urged that since saying that the allegation in the declaration, charging that the defendant had been negligent "in failing to look ahead and keep his automobile under control" was not "proved enough to include a violation of the statute regulating the speed of motor vehicles on public highways. The more fact that a vehicle is not under control does not necessarily imply that it is being operated at a speed in violation of this statute." In the case at bar the negligence charged against the defendant in the declaration was that the automobile was driven "recklessly, negligently, unlawfully and improperly," because of which it collided with the plaintiff's horse and did the damage complained of. That is a much broader allegation of negligence than was contained in the declaration involved in the case of Dunn v. Kerr. Whereas in that case the allegation that the defendant was negligent in failing to look ahead and keep his automobile under control, it was held that the declaration did not contain any allegation as the effect that the court erred in giving the jury instruction, because the case may be observed on public highways, and it was contended that the same gave the jury an instruction based upon the Motor Vehicle Act, relating to the speed at which motor vehicles

the instruction here complained of is not open to that objection. In the case of Lamley v. Crawford, 328 Ill. App. 590, one of the counts in the declaration charged that the defendant Crawford, through his chauffeur, "negligently, carelessly and improperly ran, managed and operated his motor vehicle" so as to cause the damages there sued for. The court held that the evidence showed that the chauffeur referred to had operated the automobile he was driving, in violation of the provisions of section 33 of the Motor Vehicle Act, in that he attempted to pass in front of another automobile coming into the intersection from the right, under such circumstances as to show that the other vehicle had the right of way. It was held by this court that the general allegations of negligence above referred to were sufficient to include such negligence and that it was not necessary to mention the Motor Vehicle Act in the declaration. The case at bar is not one in which the plaintiff has alleged one negligent act in his declaration, and procured the trial court to instruct the jury as to the liability of the defendant for the commission of a different negligent act. The negligence alleged in the declaration was general and inclusive of such as was mentioned in the instruction complained of. Nor is the car at bar one in which the plaintiff has declared on a common law right of action in his declaration and procured the court to instruct the jury on a statutory right of action. The statute referred to in the instruction and there quoted from, is in part declarative of the common law, and in part it lays down a rule of evidence as to what shall constitute prima facie proof of negligent speed in operating

an automobile. (5) The instruction was not peremptory and therefore it was not necessary that it include all the elements essential to a recovery by the plaintiff.

Another instruction given by the trial court was to the effect that if the jury found that the defendant John Josefik was the owner of the automobile and kept it for the pleasure and convenience of his family and, whether expressly or impliedly, permitted his son, Joseph, to drive it; and if they further believed that the accident involved in this case occurred while Joseph was driving the car for the pleasure or convenience of the family, then the defendant father would be liable to the same extent as if he had been driving the car himself at the time of the collision. It is contended that the court erred in giving this instruction to the jury, because there is no evidence in the record tending to show that the Ford touring car which the defendant admitted he owned and which he also admitted was being driven by his son at that time in question, was kept for the pleasure or convenience of the defendant's family, and for the further reason that the evidence was not sufficient to show that the car was being used by the son at the time of the accident with the consent, either express or implied, of his father, but, on the contrary, against his express directions that the son was never to use the car without his consent. The evidence bearing on these contentions was as follows: One Kastengren, a law clerk employed by counsel for the plaintiff, testified that sometime prior to the trial of this case he went out to serve a lien notice on the defendant and at that time asked the defendant certain ques-

the elements essential to a recovery in the plaintiff. and therefore it was not necessary that it include all of defendant's contentions. (3) The instruction was not peremptory

tions among which was one as to whether the defendant had requested his son to take his relative home on the day this accident happened, and he said he did. The defendant testified that he owned the car in question but that he was not at home when Joseph left to drive his cousin home; he denied the conversation testified to by the last witness referred to. He further testified that he knew this niece of his was doing some house cleaning at his home that day, but he had no conversation with his son before he left about taking her home. He testified that he drove the car himself and also that he had his son Joseph drive the car for him, but that Joseph did not have permission to use the car whenever he wanted to, and he did not know he was going to take the car out on this occasion. The witness said further: "He never takes the car out without my permission, except on this occasion he did. Otherwise always before he got my permission and he always has to have my permission. My son was not supposed to take the lady home without my orders * * * that was not the first time she had visited us. She had been at my house before lots of times. My son had never driven her home before on other occasions." Joseph, who was 16 years of age at the time of the accident, testified that when he reached home from work on the afternoon in question he found his cousin there and "my mother told me that she wants me to take my cousin home. My mother directed me to take my cousin home, * * * Then I went to the garage and got the car" and took his cousin home, - "my two little brothers were also in the car with me * * * I was driving the car about six years * * * My father was not home when I left with my cousin * * * He did not tell me to drive anybody

home * * * My mother told me * * * I took her home that day because she was tired. * * * The automobile I was driving was my father's. I have driven the machine before that day." He was asked on direct examination whether he ever drove that machine without his father's consent and his answer was in the negative. On cross-examination this witness testified that he could not remember how old he was when he first started to drive a car "because I could drive a car when I was a little boy", less than eleven years old. He was asked whether he drove his father's car when he was eleven or twelve years old and he said he did. He was then asked whether his father always gave his permission to drive it. The record then shows that no response was heard to that question, and he was then asked whether he always asked his father if he could drive the car and he answered, "Yes, I had to ask him for permission." He then testified that he drove it on this occasion without asking his father, because his mother told him to take his cousin home. He was then asked, "Your mother frequently ordered you to drive the car, isn't that true?" He answered that it was. In rebuttal, one Wojarowski, testified that he knew the plaintiff and that on the day after the accident he accompanied one of the lawyers for the plaintiff to the home of the defendant, to see what damage had been done to the Ford car, and that on that occasion he had some conversation with Joseph, in which he stated that on the day previous he had had a sister-in-law up to his house that had done some painting that day and after they got through his father told him to take the Ford out and take her home, which he did. It may be that some parts of this evidence

were entitled to little weight, but on the whole case, it is our opinion that it was for the jury to decide whether the fact was that the defendant maintained the automobile in question for the pleasure and convenience of his family and also whether he permitted his son Joseph to use the car for those purposes, either expressly or impliedly. In connection with that issue presented to the jury, the instruction was proper. We are further of the opinion that the instruction does not contain any assumption that the son was negligent in driving the car, as the defendant contends.

It is further contended that the trial court erred in refusing to give two instructions submitted in behalf of the defendants. By one of the instructions it was sought to tell the jury that if the driver of a vehicle approaches a highway intersection "under such conditions of traffic as requires of him to give and yield the right of way to intersecting travel from his right, and he does not so yield the right of way, then such action would be a violation of the law regulating travel upon the highways and would constitute negligence upon the part of such person." It is not error to refuse to give an instruction which is merely an abstract proposition of law. Moreover, we are of the opinion that theinstruction fails to state the law accurately. Counsel for the defendant calls our attention to the case of McCarthy v. Fadin, 336 Ill. App. 300, and contends that one who disregards the law as to right of way is guilty of contributory negligence as a matter of law. With that proposition we are unable to agree for the reasons we have set forth at length in an opinion which is this day being filed by this court in the case of Heidler

is also not being filed by this court in the case of Wright
the reasons we have set forth at length in an opinion which
has, With that proposition as are unable to agree for
any is guilty of contumacy regardless as to matter of
contends that one who disregards the law as to right of
to the case of McCarthy v. Indig, 328 Ill. App. 200, and
cases cited. Counsel for the defendant cells our attention
the opinion that instruction fails to state the law
merely an abstract proposition of law. However, we are of
it is not error to refuse to give an instruction which is
and would constitute negligence upon the part of such person."
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not to yield the right of way," then such action would be
of way to intersecting travel from his right, and be done
of testify as requires of him to give and yield the right
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sought to tell the jury that if the driver of a vehicle
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It is further contended that the trial court
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either expressly or impliedly. In connection with that issue
be permitted his own lawful to use the car for these purposes,
for the pleasure and convenience of his family and also whether
was that the defendant maintained the automobile in question
our opinion that it was for the jury to decide whether the ford
were entitled to little weight, but on the whole case, it is

Hardwood Lumber Co. v. Wilson & Bennett Mfg. Co., Illinois Appellate Court, First District, case #30913. The instruction referred to sought to tell the jury that if the driver of a vehicle approached an intersection "under such conditions of traffic as requires him to give and yield the right of way to intersecting travel from the right," then he would be guilty of negligence if he did not so yield, but the instruction failed in any manner to advise the jury as to what "such conditions of traffic" were.

The other instruction offered by the defendant and refused by the trial court, of which complaint is made, is open to the same criticism as the last one noted in connection with the instruction just referred to. By this instruction it was sought to state to the jury that the statute provides that all vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left; and further, that if the jury believed from the evidence that the plaintiff's horse and wagon and the defendant's automobile "were in such position with reference to each other that the defendant was entitled to have the right of way over 55th Avenue ahead of plaintiff's horse and wagon," then it was plaintiff's duty to allow the defendant to pass over the intersection first; and further, that the expression "right of way", as used in the statute, meant "the right to pass across an intersecting highway ahead of intersecting travel and free from obstruction or hindrance from such intersecting travel." There was nothing in either of these

Harkwood Lumber Co. v. Wilson & Barrett Lbr. Co., Illinois Appellate Court, First District, 1922. The instruction refused to undertake to tell the jury that if the driveway of a vendee appurtenant an intersection "under such conditions of traffic as reasonable men to give and yield the right of way to interesting travel from the right," then he would be guilty of negligence if he did not so yield, but the instruction failed in any manner to advise the jury as to what "such conditions of traffic" were.

The other instruction offered by the defendant and refused by the trial court, of which complaint is made, is open to the same criticism as the last one noted in connection with the instruction just referred to. By this instruction it was sought to state to the jury that the statute provides that all vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and that the statute provides that all vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left; and further, that if the jury believed from the evidence that the plaintiff's horse and wagon and the defendant's automobile were in such position with reference to each other that the defendant was entitled to have the right of way over said Ruth Pearce owned of plaintiff's horse and wagon, then if was plaintiff's duty to allow the defendant to pass over the intersection first; and further, that the statement "right of way" as used in the statute, meant "the right to pass across an intersecting highway ahead of intersecting

instructions giving the jury any information as to what the relative positions of the horse and wagon of the plaintiff and the automobile of the defendant should or might be, which would result in giving the defendant the right of way over the plaintiff in crossing the intersection. By the submission of such instructions as these the defendant was treating the question of whether his automobile was "approaching the intersection" in question, within the meaning of the statute and so as to make the statute applicable as a matter of fact. Where that question is one of fact for the determination of the jury, they should be accurately instructed as to the circumstances under which the statute may properly be applied, as indicated in the opinion being filed this day bythis court in the Heidler Hard Wood Lumber case, supra. These instructions failed to do that and they were properly refused.

The defendant also contends that the evidence showed that the plaintiff was guilty of contributory negligence as a matter of law. On that question the plaintiff testified that he was driving his wagon south on 55th Avenue on the west side of the street about three feet from the curb, and that as 25th street was a though street, he made a full stop at the north side of that street and looked both ways. He saw the defendant's automobile approaching about a block and a half away, and concluded he had plenty of time to pass over the intersection before the automobile reached him. He had nearly cleared the rail of the eastbound street car track on 25th street, when the defendant's automobile traveling east, partly in and partly to the south of the eastbound street car track, struck the rear end of the wagon. He testified further that he did not see any street cars going in either direction,

at the time he passed over the intersection, but that he saw such a car after the accident. His horse was walking as he proceeded over the intersection. Two boys, one 16 and the other 18 years of age who had been helping the plaintiff in his occupation of delivering vegetables, were sitting in the back part of the wagon at the time of the collision. They testified in corroboration of the plaintiff as to the facts of the occurrence. For the defendant, his son testified that as he approached this intersection, there was a west bound street car just leaving 55th avenue and there was some building material piled up at the northwest corner of the intersection; that he first saw the plaintiff as he emerged from behind the street car, driving his horse and wagon over the intersection and at this time the witness was about even with the sidewalk and was going 12 to 14 miles an hour; that the horse was running and "was on about the last track;" that the witness then blew his horn and stepped on the brakes and swung to the left, the front end of the automobile striking the rear end of the wagon. On cross-examination he testified that he was about 9 feet away from the horse when he first saw it, and he also testified he was at the north and south crosswalk on the west side of 55th avenue at that time, and that he could stop within two or three feet going 14 miles an hour. He then explained that he took about 9 feet to stop on this occasion "because he did not have a very big load in the car." Joseph's cousin gave testimony corroborating his version of the occurrence. In that state of the record we are clearly of the opinion that the questions, not only of Joseph's negligence but also of the plaintiff's contributory negligence, were properly

submitted to the jury for their determination.

For the reasons we have given the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

No. 5718a]

Stanley V. Atlas, appellee, v. Polish Progressive Press Company, appellant. Gen. No. 31,000.

243 I.A. 629

Suit to recover rent on oral lease. Judgment for plaintiff.

or to the Municipal Court of Chicago;
Superior Court of Cook county;
peal from the Circuit Court of county;
County Court of county;

Hon. , Judge, presiding. Heard

the division of

this court at the term,

rmed
ersed
ersed and remanded with directions.

nion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

ESIDING JUSTICE delivered the opinion of the court.

Consolidated with 5-718a

181 - 31000

STANLEY V. ATLAS,
Appellee,

v.

POLISH PROGRESSIVE PRESS COMPANY, a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

243 I.A. 629

Opinion filed Dec. 29, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $500, recovered against it in the Municipal Court of Chicago, by the plaintiff, Atlas, who brought this action to recover one month's rent, either on the basis of an oral lease which he claimed he had with the defendant or on the basis of use and occupation.

We are this day handing down an opinion in case No. 30999, in this court, between these same parties. That case was an action for rent covering July, August and September, and the case at bar was an action for rent of the same premises for the month of October. The reasons we have set forth at length in the course of our opinion in that case, are equally applicable here, but it will not be necessary to set them forth again.

For the reasons referred to in the opinion in the other case, the judgment of the Municipal Court, appealed from in the case at bar, is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

1937 - 6100

STANLEY V. ATLAS,

Appellee.

v.

POLICE INDEMNITY FUNDS COMPANY, a corp.,

Appellant.

2431.A. 629

OF CHICAGO.

MUNICIPAL COURT,

APPEAL FROM

Opinion filed Dec. 29th 1936.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $500, recovered against it in the Municipal Court of Chicago, by the plaintiff, Atlas, who brought this action to recover one month's rent, either on the basis of an oral lease which be claimed he had with the defendant or on the basis of use and occupation.

We are this day pronouncing an opinion in case No. 30028, in this court, between these same parties. That case was an action for rent covering July, August and September, and the case at bar was an action for rent of the same premises for the month of October. The reasons we have set forth at length in the course of our opinion in that case, are equally applicable here, but it will not be necessary to set them forth again.

For the reasons referred to in the opinion in the other case, the judgment of the Municipal Court, appealed from in the case at bar, is affirmed.

JUDGMENT AFFIRMED.

180 - 30999

STANLEY V. ATLAS,

Appellee,

v.

POLISH PROGRESSIVE PRESS COMPANY, a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

243 I.A. 629

Opinion filed Dec. 29, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Company seeks to reverse a judgment for $1500, recovered by the plaintiff Atlas in the Municipal Court of Chicago, in a suit brought by the latter to recover his claim for rent of certain premises occupied by the defendant, for the months of July, August and September, 1925.

The record shows that the premises in question were conveyed to Atlas by warranty deed on June 6, 1925, the grantor being The Polish People's Home Association. Previous to that time the defendant company had occupied the same premises as a tenant of the Home Association. When the title to the property was conveyed to Atlas, the rent for that month, which was $500, was adjusted between him and the Home Association, Atlas getting credit in their settlement for that part of the rent covering the three weeks of June, following the date upon which he acquired title. The basis of the claim of Atlas against the Press Company for rent for the three months following, for which this action was brought,

Opinion filed Dec. 29, 1938.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Company seeks to reverse a judgment for $1500, recovered by the plaintiff Aline in the Municipal Court of Chicago, in a suit brought by the latter to recover his claim for rent of certain premises occupied by the defendant, for the months of July, August and September, 1938.

The record shows that the premises in question were conveyed to Aline by warranty deed on June 6, 1938, the grantor being the Polish People's Home Association. Previous to that time the defendant company had occupied the same premises as a tenant of the Home Association. When the title to the property was conveyed to Aline, the rent for that month, $150, was adjusted between him and the Home Association, Aline getting credit in their settlement for that part of the rent covering the three weeks of June, following the date upon which he acquired title. The basis of the claim of Aline against the Prese Company for rent for the three months following, for which this action was brought,

was an alleged oral lease between the parties, which he contended he had entered into with the Company, through one Olszewski, at the time he acquired title, and which had later been confirmed and ratified by the board of directors of the company. On the other hand, the defendant took the position that the plaintiff, Atlas, was not in fact the owner of the property, but that the Home Association was still the owner and entitled to the rents; and further, that Olszewski had no authority to negotiate an oral lease with the plaintiff, and, in fact, that he had never entered into any such lease, or if he had, that it had never been ratified by the board of directors of the company, as the plaintiff claimed. The issues were submitted to a jury, resulting in a verdict for the plaintiff and the judgment appealed from.

In support of its appeal, defendant contends that the trial court erred in permitting Atlas to testify that he was the owner of the property. In our opinion, the court did not err in overruling the defendant's objections to that testimony. 3 Wigmore on Evidence, Section 1960.

On June 6, 1925, when the plaintiff Atlas received his warranty deed to this property, executed by the Home Association, four people were present, who, in addition to the plaintiff himself, were his lawyer, whose name was Bisek; Olszewski, and another lawyer whose name was Ell. These four met in Ell's office. The plaintiff in the course of his testimony stated that Bisek was there as the representative of the plaintiff and that there was also present "a representative of the Polish People's Home Association," whose name was

ite of the Tolley Lodge's Home Association," whose name was of the Plaintiff and that there was also pursuant to a resolution testimony showed that Bleep was there as the representative met by Bill's office. The Plaintiff in the course of his Clearwell, and another lawyer whose name was Bill. These four the Plaintiff himself, none Mrs Jamison" whose name was Bleep; insemination, four people were present, who, in addition to pity warranty deed to this property, executed by the Honor- On June 6, 1988, when the Plaintiff Vilma received

tions to that testimony. 2 Wigmore on Evidence, section 1360. the court did not err in sustaining the defendant's objec-

that he was the owner of the property. In one opinion" the trial court erred in permitting Vilma to testify In support of its appeal, defendant contends

for the Plaintiff and the judgment appealed from.

The issues were submitted to a jury, resulting in a verdict of dismissal of the complaint, as the plaintiff claimed, on it be had, that it had never been ratified by the board and, in fact, that he had never entered into any such lease, no authority to negotiate an oral lease with the Plaintiff, and entitled to the rents; and further, that Clearwell had property, but that the lease transaction was still the owner that the plaintiff, Vilma, was not in fact the owner of the company. On the other hand, the defendant took the position been ratified by the board of directors of the Clearwell, at the time he acquired title, and which had later contended he had entered into with the Company, through one was an alleged oral lease between the parties, which he

Olszewski. He further testified that Olszewski produced a warranty deed to the property at that time and delivered it to him, the plaintiff, in exchange for a certified check which he handed to Olszewski. The defendant objected to the testimony that Olszewski was there as the representative of the Home Association, and now contends that the trial court erred in overruling that objection. In our opinion, the objection was properly overruled. A statement to the effect that one is present at a given conference or meeting, representing the Home Association, is a statement of a fact, just as the statement that Bisek was present at the conference in question representing the plaintiff, is a statement of fact. Whether Olszewski was duly authorized to represent the Association, or what the extent of his authority might have been, is in no way, involved in the bare assertion that he was present on that occasion, representing the Association. It would, of course, not follow from the fact that Olszewski was there as the representative of the Association, that the latter would be bound by anything he did or said at that conference, in the absence of further proof, to the effect that he was duly authorized by the Association to act for it and that whatever he said or did, was within the scope of his authority. Merely the statement by the plaintiff, that Olszewski was present, representing the Association, was, in our opinion, competent.

The defendant makes the further contention that the trial court erred in refusing to admit evidence which was offered in an attempt to show that the warranty deed from the Home Association to the plaintiff, which the latter introduced in evidence, was, in fact, a mortgage, citing German Ins. Co. v. Gibe, 162 Ill. 251, and other cases.

representing the Association' was, in one opinion' competent, statement by the plaintiff' that Olmswood was present' re- or did' was within the scope of his authority. Nearly the by the Association to act for it and that whatever he said further proof' to the effect that he was duly authorized thing he did or said at that conference' in the absence of the Association' that the latter would be bound by any- from the fact that Olmswood was there as the representative meeting' representing the Home Association' is a statement of a fact' just as the statement that Nixon was present at the conference in question representing the plaintiff' is a statement of fact. Whether Olmswood was duly authori- zed to represent the Association' or what the extent of his authority might have been' is no fact' involving in the bare connection that he was present on that occasion' re- opinion' the objection was properly overruled. A statement to the effect that one is present at a given conference or trial could arise in overruling that objection. By one the testimony that Olmswood was there as the representa- tive of the Home Association' and not something that the plaintiff' in fact, was the defendant' which the latter in- tended in saying' was' in fact' a mortgage' dated the Association' to the plaintiff' which the latter in- and offered in an attempt to show that the mortgage read from

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representing the Association' was' in one opinion' competent, statement by the plaintiff' that Olmswood was present' re- or did' was within the scope of his authority. Nearly the by the Association to act for it and that whatever he said further proof' to the effect that he was duly authorized thing he did or said at that conference' in the absence of the Association' that the latter would be bound by any- from the fact that Olmswood was there as the representative meeting' representing the Home Association' is a statement of a fact' just as the statement that Nixon was present at the conference in question representing the plaintiff' is a statement of fact. Whether Olmswood was duly authori- zed to represent the Association' or what the extent of his authority might have been' is no fact' involving in the bare connection that he was present on that occasion' re- opinion' the objection was properly overruled. A statement to the effect that one is present at a given conference or trial could arise in overruling that objection. By one the testimony that Olmswood was there as the representa- tive of the Home Association' and not something that the plaintiff' in fact, was the defendant' which the latter in- tended in saying' was' in fact' a mortgage' dated the Association' to the plaintiff' which the latter in- and offered in an attempt to show that the mortgage read from

The defendant makes the further contention that

It is entirely clear, not only from certain offers of testimony made by counsel for the defendant, in the course of his cross-examination of the witness, Atlas, but also from parts of the testimony of that witness, as it appears in several places in the course of his cross-examination, that what the defendant was really trying to show was that although the deed from the Home Association to Atlas was, on its face, a warranty deed, the real situation was that at the time such deed was given an agreement or arrangement was entered into between Atlas and the Home Association, whereby the Association was given the right to re-purchase the property at any time within a year, upon the payment of a sum which the parties then agreed upon. Although it is true that on several occasions during the cross-examination of the plaintiff, as well as during the examination of one or two of the defendant's witnesses, offers of testimony to this effect were rejected by the trial court, on objection of counsel for the plaintiff, it further appears that in several other instances, counsel for the defendant was able to bring out this situation clearly, - on at least one occasion the court itself adding a question or two which served to bring out that the situation between the parties was as the defendant contended. It was also clearly made to appear, by evidence which was admitted and is to be found in the record, that the Homes Association was indebted to Atlas on a loan and for that reason, title to this property was conveyed to him by means of the deed in question, with the agreement for repurchase above referred to. In other words, the situation which at some places in the record the defendant was precluded from showing, by the objections which it is now contended the trial court erred

in sustaining, at other places in the record it is shown the defendant succeeded in bringing out and making clear. So even if we may consider that the trial court should not have made the rulings complained of, we are of the opinion that they may not be considered as having done the defendant any harm. Moreover, we are further of the opinion that even though all the defendant contends for in this connection is conceded, it would not follow that the plaintiff would not be in a position to lease the premises to the defendant, as he claimed he had. That would all depend upon the terms that may have entered into the alleged agreement, which was entered into between the Home Association and the plaintiff. That the terms of their arrangement were such as to entitle the plaintiff to the rent, of the Home Association's tenant, the Press Company, is indicated by the fact shown by the evidence in the record, that the Home Association having collected the rent, which amounted to $500, for the month in the midst of which the title was passing to the plaintiff under the deed, allowed the plaintiff a credit for that period of the rent for that month which was represented by the part of the month which remained after the date of the transaction.

The defendant further contends that "the court erred in ruling out all evidence that the deed in question was authorized neither by the Board of Directors nor the stockholders of the grantor corporation, was without consideration, and was not the deed of the grantor." The only specific offers of evidence made by the defendant, as shown by the record, so far as the deed in question is concerned, were offers to show that the deed was in fact a mortgage

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The defendant further contends that "the court erred in ruling out all evidence that the deed in question was authorized neither by the Board of Directors nor the stockholders of the Premier Corporation, was without consideration, and was not the deed of the Grantor." The only specific offers of evidence made by the defendant, as shown by the record, so far as the deed in question is concerned, were offers to show that the deed was in fact a mortgage

the part of the month which remained after the date of the transaction.

period of the rent for that month which was represented by under the deed, allowed the plaintiff a credit for that in the midst of which the title was passing to the plaintiff collected the rent, which amounted to $800, for the month the evidence in the record, that the Home Association having tenant, this Trade Company, is indicated by the fact shown by until the plaintiff in the suit, of the Home Association's suit. That the terms of their arrangement were such as to was entered into between the Home Association and the plaintiff that may have existed into the alleged agreement, which or be claimed by her. That would all depend upon the terms be in a position to issue the premises to the defendant, conceded, it would not follow that the plaintiff would not through all the defendant contends for in this connection is here. Moreover, we are further of the opinion that even they may not be considered as having done the defendant any made the ruling complained of, we are of the opinion that even if we may consider that the trial court should not have

or that the giving of this deed was coupled with a condition. We have already stated that in our opinion the record shows that the real situation which surrounded the giving of this deed was shown. On the offer of evidence as actually made and shown in the record, we do not find any such error as in our opinion would justify a reversal of this judgment. It was nowhere shown, nor was there any offer to prove that the Home Association was claiming that the defendant was under any obligation to it for rent of these premises after the month of June.

On the issue of whether the parties entered into an oral lease, as claimed by the plaintiff, the defendant contends that the verdict and judgment appealed from are against the manifest weight of the evidence. On this point the plaintiff testified that at the time in question, when he received the warranty deed conveying title to these premises to him, he and his lawyer, Bisek, had considerable talk with the other lawyer, Ell, and with Olszewski, about a lease to the premises to run from him, the plaintiff, to the Press Company; that the question of this lease was raised by Olszewski, who wanted a lease for five years, but the plaintiff told him he was unwilling to give him a lease for more than three years, at a rental of $500.00; that no objection was made to that price but that they discussed the matter of the length of the term; that one of the parties wanted a long form lease, but one was not available, so Ell prepared a short form lease, which the plaintiff signed and delivered to Ell and Olszewski at that time, Ell promising to have the lease signed by the defendant and de-

or that the giving of this deed was coupled with a condition.
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that the real attention which surrounded the giving of this
deed was shown. On the offer of evidence as actually made
and shown in the record, we do not think any such error as
it was somewhere shown, nor was there any effort to prove
that the Home Association was claiming that the defendant
was under any obligation to it for term of three hundred
after the month of June.

On the issue of whether the parties entered into
an oral lease, as claimed by the plaintiff, the determining
contends that the verdict and judgment rendered from the
evidence the manifest weight of the evidence. In this
point the plaintiff testified that at the time of execution
when he received the warranty deed conveying title to them
promises to him, he and his lawyer, Mixer, had conversation
talk with the other lawyer, Hil, and with Glassmeyer, about a
lease to the premises to run from him, the plaintiff, to
the Home Company; that the execution of this lease was
urged by Glassmeyer, who wanted a lease for five years,
but the plaintiff said him he was unwilling to give him a
lease for more than three years, at a rental of $300.00;
that no objection was made to that price but that they di-
cussed the matter of the length of the term that one of the
parties wanted a long term lease, but one was not available,
all pleased a short term lease, which the plaintiff
pleasantly to him the lease signed by the defendant Co-
signed and delivered to Hil and Glassmeyer at that time. Hil
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parties wanted a long term lease, but one was not available,
all pleased a short term lease, which the plaintiff
pleasantly to him the lease signed by the defendant Co-
signed and delivered to Hil and Glassmeyer at that time. Hil

livered to Bisek; that the plaintiff then stated that until a written lease was executed by the parties, the defendant was to remain in possession as the tenant, from month to month, at a $500 rental, and "they said, 'all right, the lease will be signed and we will pay you $500.'" The plaintiff's attorney took the stand and testified to the same effect. The jury were instructed by the court to the effect that if a lawyer for a litigant found it was going to be necessary to offer himself in a case as a witness, he ought to cease acting as the attorney, and the court further instructed the jury that the testimony of one who is acting in the case as a lawyer for one of the parties, was "entitled to but little weight." The plaintiff testified that later, during the months of July and August, he attended several meetings of the board of directors of the defendant Press Company, at their request, and at these times he demanded the rent which he claimed was due; and on each occasion they did not deny the rent was due or take the position that he was not the owner of the premises or not entitled to the rent, but they requested him to give them some further time, explaining that their receipts had not been such as to make it possible for them to makethese payments. He also testified that he demanded his written lease and that they replied that "they could not execute the lease because it was unsettled at that time, - they haven't got enough money to release the bill of sale which I needed at that time." Just what that means, we are unable to determine. It would seem from a number of statements appearing in the record, that the plaintiff had loaned considerable money to the Home Association and that they had given him the warranty deed to this property, with an option giving them

the right to buy it back within the year, as security. It would also seem, from references in the record, that the plaintiff was looking to the Press Company as well as to the Home Association for the payment of this loan. At least it appears that there was a loan owing from the Press Company to the plaintiff. Whether that was the same loan as the one owing to him from the Home Association, is not clear. Although these two organizations were separate corporations, it would seem from the record, and indeed it was stated upon the oral argument of this case, that these two groups were "all the same crowd." For the defendant, three of the members of the board of directors of the Press Company testified that when the plaintiff appeared at the meetings of their board, in July and August, and demanded that they pay him the rent he claimed to be due and requested them to execute a lease of the premises, they refused to make any such payments nor to execute a lease but that no such reasons were given, as the plaintiff testified about. One of them testified that on one of these occasions the plaintiff was asked how he got a deed to the premises and that Atlas explained that, and added something to the effect a deed was better than a third mortgage. One of them also testified that the plaintiff claimed that Olszweski had made an agreement about the lease, and someone who was present asked who authorized him to do that; and Olszewski, who was also present as a member of the Board of Directors, spoke up and "said that would be for the good of the institution;" and Olszewski was then asked what authority he had to enter into a lease, and he said he had none. This witness denied that they had re-

the rights to buy it back within the year, as counsel
it would also seem, from reference in the record, that
the plaintiff was looking to the Prose Company as well
as to the Home Association for the payment of this loan.
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Prose Company to the plaintiff. Whether that was the
same loan as the one owing to him from the Home Association,
is not clear. Although these two organizations were
apparently corporations, it would seem from the record, and
indeed it was stated upon the oral argument of this case,
that these two groups were "all the same crowd." For
the defendant, three of the members of the board of
directors of the Prose Company testified that when the
plaintiff appeared at the meeting of April 22nd, in
July and August, and demanded that her pay for the rest
of the furniture, they refused to come out and pay-
merits for to execute a lease but that so much confusion
was added something to the effect a deed\better than
a title mortgage. One of them also testified that she
was
that, and added something to the effect a deed better than
a lease, and that Atlee explained
how he had a deed to the premises and that Atlee explained
given, as the plaintiff testified among. One of them testi-
fied that on one of these occasions the plaintiff was asked
by Mrs. and someone who was present, later the plaintiff
the lease, and someone who was present, later the plaintiff
plaintiff claimed that Diamond had made an agreement about
him to do that and Diamond, who was also housed as a
member of the Board of Directors, spoke up and "said that
would be for the good of the institution," and Diamond was
then asked what authority he had to order Mrs Prose, and
he said he had none. This witness denied that they pa-

fused to execute a lease because of their financial condition, but stated that it was because they took the position that the Home Association still owned the property. One of these witnesses testified that Bisek, who accompanied the plaintiff to one of these meetings of the board, stated that they ought to recognize the plaintiff as their landlord because he had a deed to the property; and that the witness then spoke up and mentioned the fact that the deed was, in fact, a mortgage, and that they would not recognize that, adding "Do you expect us to pay rent to two people?"

Olszewski testified, admitting that he was present at the conference in Ell's office in June, 1926, and that the warranty deed which the plaintiff had introduced in evidence was delivered to him at that time, by the witness, but he denied receiving any check from the plaintiff on that occasion. He admitted there was a discussion there about a lease but he stated that he took the position that the defendant company ought to have a lease from the plaintiff to show that they had a right to occupy the premises, in case the Home Association did not exercise its option and the year expired, leaving the plaintiff as owner of the premises. This witness further testified that all propositions made by the plaintiff, as to the terms of the proposed lease, involving both the period of the lease and the rent, were metby the witness with the statement that he had no authority to make any agreement as these were matters that would have to be determined by the Board of Directors of the defendant company. The witnesses for the defendant admitted that promises were made to the plaintiff at one or more of these meetings, in-

made to the Plaintiff on one or more of these meetings."

The witnesses for the defendant admitted that promises were determined by the Board of Directors at the relevant meeting. any agreement as these were matters that would have to be witness with the statement that he had no authority to make them. The period of the lease and the rent, were matter the Plaintiff," as to the terms of the proposed lease, involving witness further testified that all promotions made by the expired, leaving the Plaintiff as owner of the premises. This time Association did not exercise its option and the year to show that they had a right to occupy the premises, in case defendant company ought to have a lease from the Plaintiff about a lease, but he stated that he took the position that the that occasion. He admitted there was a discussion there evidence was delivered to him at that time, by the witness, but be denied receiving any check from the plaintiff on the warranty deed which the Plaintiff had introduced in at the conference in Hill's office in June, 1958, and that

Plaintiff testified, admitting that he was present adding "Do you expect me to pay rent to two people" then spoke up and mentioned the fact that the deed was. In fact, a mortgage, and that they would not recognize that" because he had a deed to the property; and that the witness that they ought to recognize the plaintiff as their landlord the Plaintiff to one of these meetings of the Board, stated One of these witnesses testified that Black, who accompanied tion that the Home Association still owned the property, dition, but stated that it was because they took the condi- tuned to execute a lease because of their financial con-

volving the making of some payments to him, but they testified that these had no reference to payments of rent for these premises, but they all referred to a loan which the plaintiff held. They further testified that the Board of Directors of the defendant company never passed upon nor confirmed the making of a lease with the plaintiff.

Another witness testified to a conversation he heard between the plaintiff and Olszewski, at the premises occupied by the defendant, during the month of August, involving thematter of the rent of these premises; that the plaintiff had been away on a vacation and upon his return came to ask Olszewski about the rent and Olszewski "said that he wasn't entitled to any rent, - he said that he would pay all the loan,- all the rest of the loan that he has to pay for the Polish Association, but that he won't get no rent from the Polish Progressive Press Company."

If the question of the existence of the alleged oral lease rested upon the authority of Olszewski to enter into such a lease, we would have to say the verdict and judgment were against the manifest weight of the evidence, because we do not find anything in the record, showing or tending to show, that Oszewski had any authority to enter into such a lease. But the jury were warranted in finding the issues as they did, provided they believed that a preponderance of the evidence showed that an agreement amounting to an oral lease was entered into between the plaintiff and Olszewski and was afterward ratified by the defendant

with the plaintiff.

Another witness testified to a conversation between the plaintiff and Gleason, at the premises occupied by the defendant, during the month of August, relating thereto of the rent of these premises; that the plaintiff had been away on a vacation and upon his return came to ask Gleason about the rent and Gleason "said that he wasn't entitled to any rent" - he said that he would pay all the loss - all the rent there on hand.

It the question of the existence of the alleged oral lease rested upon the authority of Gleason to enter into such a lease, we would have to say the verdict and judgment were against the manifest weight of the evidence, because we do not find anything in the record, bearing on pending to show, that Gleason had any authority to enter into such a lease. But they have warranted in finding the terms as they did, because they believed that a preponderance of the evidence showed that an agreement somewhat to an oral lease was entered into between the plaintiff and Gleason; but we entirely retiring at the E-lease

[illegible]

[illegible]

company. On that issue the testimony is in direct conflict, that of the plaintiff being to the effect that there was such a ratification; and that submitted in behalf of the defendant to the opposite effect. The jury apparently believed the plaintiff's testimony and that of his attorney, in the light of the instruction of the court to which we have referred, as against that of the three directors of the defendant company, and the evidence in the record, all of which we have carefully examined, is not such, in our opinion, as to warrant this court in holding that the finding of the jury was against the manifest weight of the evidence on that issue.

The defendant company had occupied these premises as a tenant of the Home Association, previous to June 6, 1935. The record shows that the $500 representing the rent for that month was adjusted between the Home Association and the plaintiff when the title to this property was deeded from the former to the latter. That the plaintiff made repeated demands for rent in July and August is admitted, as is also the fact that the defendant continued to occupy the premises, and was still in possession at the time of the trial of this case.

For the reasons given, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

333 - 31052

WEST CENTRAL BANK, a corp.,
Appellant,

v.

U. S: FIDELITY & GUARANTY CO., a corp.,
Appellee.

243 I.A. 630

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff bank brought this action against the defendant insurance company, to recover a loss of $13,209.88, which it claimed was covered by a Bank Burglary and Robbery Insurance Policy, which had been issued to it by the defendant. In addition to a plea of the general issue, the defendant interposed special pleas to the declaration filed by the plaintiff, in which the defendant set up certain provisions of its policy and alleged that the facts surrounding this loss were such as not to bring it within the terms of the policy. It also alleged in another of these pleas that the plaintiff had falsely represented that the vault covered by the policy was of reinforced concrete construction, but that the fact was, it was "made of material less strong and easy to gain access to and that the proximate cause of the alleged loss was such poor construction of the vault." At the close of the plaintiff's case the trial court instructed the jury to find the issues for the defendant. Such a verdict having been returned, a judgment was entered in favor of the defend-

2431.A. 630

Opinion filed Dec. 28th 1888.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff here brought this action against the defendant insurance company, to recover a loss of $18,308.88, which it claimed was covered by a Bank Burglary and Robbery Insurance Policy, which had been issued to it by the defendant. In addition to a plea of the general issue, the defendant interposed special pleas to the declaration filed by the plaintiff, in which the defendant set up certain provisions of its policy and alleged that the facts surrounding this loss were such as not to bring it within the terms of the policy. It also alleged in another of those pleas that the plaintiff had falsely represented that the vault covered by the policy was of reinforced concrete construction, but that the fact was, it was "made of material less strong and easy to pick access to and that the pecuniary excess of the alleged loss was much less consideration of the vault." At the close of the plaintiff's case the trial court instructed the jury to find the issues for the defendant. Such a verdict having been returned, a judgment was entered in favor of the defend-

ant and against the plaintiff, from which the latter has perfected this appeal.

The policy issued by the defendant to the plaintiff, insured the latter against burglary of money or securities feloniously abstracted from within any safe or vault covered by the policy, "by any person or persons who shall have made forcible entry therein by the use of tools, explosives, electricity, gas, or other chemicals, while such safe or vault is duly closed and locked." The policy also contained a clause which provided, among other things, that the defendant company was not liable "for loss or damage from or contributed to by * * * undue exposure of any safe or vault during repairs to either or to the building in which either is contained." The record shows that the description of the safe or vault which was insured, as contained in the schedule attached to and made a part of the policy, included a statement to the effect that it was of reinforced concrete.

The evidence shows that when the plaintiff moved into the premises occupied by it at the time of the loss, it had a reinforced concrete vault constructed. This was fitted with a solid steel door with four time locks in it, which door provided the only means of entrance to the vault. This vault was divided into two compartments by a steel partition half an inch thick. The part of the vault in front of this steel partitition was used to keep records, abstracts of title, silverware and similar articles left with the bank for safekeeping, while the part of the vault beyond the inside steel partition contained a number of safety deposit boxes, and also a safe in which the tellers placed the money from their cages at the close of the bank's business each day.

and end against the plaintiff, from which the latter has per-
fected this appeal.

The policy issued by the defendant to the plaintiff,
insured the latter against burglary of money or securities
feloniously abstracted from within any safe or vault covered
by the policy, "by any persons or persons who shall have made
forcible entry thereto by the use of tools, explosives, elec-
tricity, gas, or other chemicals, within such safe or vault
is duly closed and locked." The policy also contained a
clause which provided, among other things, that the defend-
ant company was not liable "for loss or damage from or con-
tributed to by " " " wanton exposure of any safe or vault dur-
ing removal to either or to the building in which either is
contained." The record shows that the description of the safe
or vault which was insured, as contained in the schedule
attached to and made a part of the policy, included a state-
ment to the effect that it was of reinforced concrete.

The evidence shows that when the plaintiff moved
into the premises occupied by it at the time of the loss, it
had a reinforced concrete vault constructed. This was fitted
with a solid steel door with four time locks in it, which door
provided the only means of entrance to the vault. This vault
was divided into two compartments by a steel partition built
as time went. The part of the vault in front of this steel
partition was used to keep records, elements of title, silver-
ware and similar articles left with the bank for safekeeping,
while the part of the vault beyond the inside steel partition
contained a number of safety deposit boxes, and also a safe in

The burglary involved in this case occurred between Saturday night and Monday morning. About two weeks prior to the time of the burglary, one of the time locks in the vault door needed repairing, and a man who was procured to make such repairs took the lock out of the door. In doing this, a steel pin which was a part of the mechanism of the door was allowed to drop out of place. This had the effect of locking the door so that it could not be opened even with the help of experts. The only way to gain access to the vault was by cutting a hole through the wall. This was done by some employees of the Chicago Safe & Lock Company. It took them all day to chisel through the concrete and cut the reinforcing steel bars so as to make an opening through the vault wall about 18 inches in diameter. After this work was done, a man was put through the hole into the vault and from the inside he was able to get the vault door open. When this had been accomplished the plaintiff applied to the Chicago Safe & Lock Company for the installation of an emergency door to be installed at the point where the hole had been cut through the wall, but the company was not able to furnish such a door.

The vault door having thus been opened was repaired, but the evidence shows that the opening which had been cut through the wall was not repaired at once, but the president of the plaintiff bank, with the assistance of some of the employees, placed a steel plate about 2 feet square and one-fourth of an inch thick, which had been used as a runway approach to the vault door entrance, against this opening in the wall, from the inside, and they braced this plate up against the inside of the wall by means of several two-by-fours,

The burglary involved in this case occurred between eight and nine o'clock Monday morning. About two weeks prior to the time of the burglary, one of the time locks in the vault door needed repairing, and a man who was employed to make such repairs took the lock out of the door. He doing this, a steel door at the rear of the vault was opened from the inside by means of a key which was a part of the mechanism of the door and allowed the door to drop out of place. This had the effect of locking the door so that it could not be opened even with the help of experts. The only way to gain access to the vault was by making a hole through the wall. This was done by some employees of the Chicago Safe & Lock Company. It took them all day to chisel through the concrete and cut the reinforcing steel bars so as to make an opening through the vault wall about 12 inches in diameter. After this work was done, a man was put through the hole into the vault and from the inside he was able to get the vault door open. When this had been accomplished the plaintiff applied to the Chicago Safe & Lock Company for the installation of an emergency door to be installed at the point where the hole had been cut through the wall, but the company was not able to furnish such a door.

The vault door burned this room opened was reported

Exhibit

the ends of which were braced against the steel plate and at the other end against the opposite wall or some upright shelving which stood there. They then moved several tables and boxes in the vault up against the steel plate. The outside ofthe hole was covered up with a piece of board which was apparently loose. The vault remained in that condition for approximately a week prior to the burglary.

The bank had a janitor whose name was Anderson. He had been in their employ for four or five months. He and his wife lived in an apartment on an upper floor in the building in which the bank was located. The president of the bank and his wife lived in another apartment in the same building. The janitor had access to the premises of the bank at any time. On Sunday, March 18, 1934, the president had occasion to step into the bank premises twice during the day, and he found Anderson there on both occasions. The first time was in the forenoon and the second time was about the middle of the afternoon. On this latter occasion the janitor was standing beside the desk of one of the officers of the bank and one of the drawers of the desk was open and a large revolver, apparently kept on the premises for use in case of a robbery, was lying on the top of the desk, and there was a supply of ammunition in the desk drawer, which was open. The president of the bank asked the janitor what he had the gun out there for and he said he was just getting it out and was laying it back, and the president told him such things were not to be fooled with, and that he might hurt someone, and he directed him to put the gun back where it belonged. It appears from the evidence that it was no

part of the duties of the janitor to clean this gun or handle it in any way. The record shows that guns were kept in the desk drawers of several of the people in the bank.

Early on the morning of Monday, March 17, the janitor's wife went to the apartment of the president of the bank and told him that her husband had disappeared the day before and had not come home that night. The fire in the heating plant in the basement needed attention and it appears that the president of the bank saw to that and then looked about the premises, but could find no trace of the janitor. His working clothes were missing from his apartment but his good clothes and his watch and his pocket book, containing a small amount of money, were there. About eight o'clock, when the time-lock on the vault door permitted it to be opened, the president of the bank got into the vault and there he found the pieces of scantling which had been used to brace the steel plate against the inside of the wall, where the hole had been cut through, lying on the floor; the plate and furniture which had been pushed up against it, shoved aside; the lock on the door on the steel partition leading into the inner compartment broken; the safe in which the tellers of the bank kept their money, opened; and it was apparent that the vault had been burglarized by one who had gained access thereto through the hole which had been cut through the wall about a week before. A checkup disclosed that the money taken amounted to the claim which the bank sought to collect by means of this action.

After the hole had been cut through the wall of the vault and that opening was sought to be protected or closed by means of the steel plate and the scantling, it is clear,

by means of the steel plate and the something, it is clear, vault and that opening was sought to be prevented or closed

After the hole had been cut through the wall of the which the bank sought to collect by means of this action.

A question disclosed that the money taken amounted to the claim hole which had been cut through the wall about a week before. Burglaries by one who had gained access thereto through the money. Opened and it was apparent that the vault had been opening; the note in which the bottom of the bank kept their door on the steel partition leading into the inner compartment had been pushed up against it. Moreen noted; the look on the face out through. Lying on the floor; the plate and fluctuation which plate against the inside of the wall, where the hole had been the piece of something which had been used to brace the steel pressure of the bank got into the vault and there he found time-lock on the vault door permitted it to be opened, the amount of money, were there. Upon night arrived, when the clothes and his watch and his pocket book, containing a small working clothes were missing from his apartment but his good the premises, but could find no trace of the janitor. His that the president of the bank was to that and then looked about opening plant in the basement needed attention and it appears before and had not come home that night. The time in the janitor's wife went to the apartment of the president of the bank and told him that her husband had disappeared the day

Early on the morning of Monday, March 17, the desk drawers of several of the people in the bank.

it in any way. The record shows that guns were kept in the part of the duties of the janitor at first time on hand,

in our opinion, that the vault ceased to be such as the insurance policy contemplated, and it is equally clear that the proximate cause of the loss suffered by the bank lay in the fact that it could no longer be said to be a vault of reinforced concrete construction, but a vault, one of the walls of which contained an opening large enough for a man to crawl through, protected in a manner which we believe every reasonable person would consider unsafe and insecure.

There is considerable discussion in the briefs about the rules applicable to the construction of language to be found in insurance policies. It is true that where there is any ambiguity in such language or where the language employed is capable of two reasonable constructions, the doubt presented is to be resolved against the company, whose language the policy is. but in our opinion, there is no ambiguity in the language used in the policy involved here. By the policy, the bank is insured against loss by burglary from within that part of any safe or vault covered by the policy, by anyone making forcible entry into such safe or vault by the use of tools, explosives, electricity, gas or other chemicals, "while such safe or vault is duly closed and locked." The plaintiff contends that the phrase quoted necessarily refers to the door of the vault and not to the wall, and inasmuch as the vault door is shown to have been duly closed and locked, the terms of the policy were complied with. This contention is entirely without merit. The policy insures against burglary from a bank vault, provided such "vault is dulyclosed and locked," and in our opinion that phrase necessarily applies not merely to the

door but to the vault, and certainly a vault is not closed, even when the door is securely locked, and its walls are built of reinforced concrete, when a man size hole has been cut through one of the walls and left in the manner which the evidence shows the plaintiff left the hole in its vault.

It is true that the question of whether the facts disclosed by the evidence bring the situation involved, within the provisions of the policy, which the plaintiff claims are applicable, ordinarily presents a question for the jury, but, in our opinion, the trial court in the case at bar was correct in holding that all reasonable minds would conclude that the situation presented by the plaintiff's evidence was not such as to bring the loss sued for within the terms of the policy which the defendant had issued. It is impossible for us to appreciate how any reasonable person could conclude that the vault of the plaintiff bank, as it existed according to the plaintiff's own evidence, at the time it was burglarized, was "duly closed and locked", within the contemplation of this policy providing for bank burglary insurance.

Likewise, it may be said that the question of whether a given state of facts shows that a loss by burglary has been contributed to by "undue exposure" of the vault, is ordinarily one to be left to the jury under the evidence, but again we are of the opinion, as the trial court was, that reasonable minds would not differ over the situation disclosed by the plaintiff's evidence, but would conclude that the loss suffered by the plaintiff bank was not only contributed to but was the direct result of the fact that the plaintiff permitted this

the evidence shows the plaintiff left the pole in its usual, and through one of the walls and left in the manner which built of reinforced concrete, when a man also pole has been even when the door is securely locked, and its walls are down but to the result, and certainly a result is not closed.

hole to remain in its vault wall, with an attempt at some protection from the inside which no one could successfully contend was adequate, but which all reasonable minds would consider subjected the vault to "undue exposure", within the meaning of the clause in the policy which we have quoted above.

In our opinion the fact that the door in the steel partition inside the vault was locked and had to be broken open before the one who feloniously removed this money from the bank could reach the place where the money was kept, does not alter the situation. The policy clearly shows that it covered only valuables kept within the reinforced concrete vault while the latter was "duly closed and locked." It would of course not be contended that ifthe vault door had been left open, and anybody thereby had gained access to its interior and having done so, had forced open a box or safe or other inside receptacle, the policy would apply. Some such situation was involved in Blank v. Nat'l. Surety Co. , 181 Ia. 648, and that wasthe holding of the court there. We are unable to see any substantial difference between that state of facts and the one presented here.

Other questions are discussed in the briefs involving other clauses in this policy, which the defendant claims are such as to conclusively show that the loss here sued for did not come within the terms of the policy, but, in our opinion, it will not be necessary to pass upon them here, for the provisions already referred to are, in our opinion, sufficient to dispose of the issues presented.

For the reasons we have given, we are of the opinion the trial court was correct in holding that the plaintiff's evidence, including all reasonable inferences to be drawn therefrom, and considered most favorably for the plaintiff, shows, as a matter of law, that the loss sued for did not come within the terms of thepolicy. The trial court, therefore, did not err in instructing the jury to find the issues for the defendant. The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

261 - 31081

FRANK BECKER,
Appellee,

v.

LOUIS GOTTLIEB, ETC.,
Appellant.

243 I.A. 630

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Dec. 29, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Gottlieb seeks to reverse a judgment for $603.97, recovered against him in the Municipal Court of Chicago by plaintiff, Becker. In his statement of claim the plaintiff alleged that his claim was for goods, wares and merchandise, sold and delivered to the defendant; that on July 19, 1923, the defendant acquired possession and control of a restaurant known as the New Paradise Restaurant, and at that time requested the plaintiff to supply him his meats; that there was due the plaintiff from the previous proprietors of the restaurant, a balance of $118.63, and the plaintiff declined to make further deliveries of material to the restaurant unless the defendant assumed that old account, which he did, requesting the plaintiff to continue supplying the restaurant with meat, and assuring him that he would pay for whatever meats were supplied; that the defendant continued to control and operate the restaurant and that the plaintiff continued to deliver meat to the restaurant, as per a statement attached to the statement of claim. This statement contained

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a number of dates, with what purport to be the amounts of purchases on such dates. The plaintiff also alleged that certain items had been paid on account, aggregating $170.51.

By his affidavit of merits the defendant made a general denial of the allegations set forth by the plaintiff, and alleged further that any such promise as the plaintiff claimed had been made by the defendant, covering the payment of the balance alleged to have been incurred by the previous owners of the restaurant, was within the statute of frauds, and not being in writing, the plaintiff could not recover on it. The evidence introduced by the respective parties was submitted to a jury, resulting in a verdict finding the issues for the plaintiff, and assessing his damages at the amount for which judgment was entered; following which, the defendant perfected this appeal.

The plaintiff introduced testimony tending to establish his claim. This restaurant had been operated as the New Paradise Restaurant by two individuals named Oprica and Tunkl. Oprica sold out to Tunkl, and shortly thereafter, the plaintiff's evidence tended to show the defendant took the restaurant over and operated it. The defendant on the other hand, contended and submitted evidence tending to show that he did not operate it, but that he merely held a chattel mortgage against it. The plaintiff testified that when the defendant took the restaurant over there was a balance of $118.63, due him for meats which he had been supplying to the former proprietors, and there is sufficient testimony by the plaintiff warranting the jury in believing that the plaintiff went to the defendant and asked about this bal-

ance and received the defendant's promise that he would take care of it, and that at the same time the defendant got the plaintiff to agree to supply the restaurant with meat. We believe that this testimony is such that the jury would be justified in finding that the defendant agreed to take care of the balance, in part at least, so as to secure a continuance of the supply from the plaintiff. The defendant denied all the facts as thus testified to by the plaintiff, but this conflicting testimony was for the jury to consider and we could not say, from the evidence in the record, that their conclusion was against the manifest weight of the evidence, nor is that contended. In view of the testimony of the plaintiff, to which we have referred, and such inferences as we have said we believe the jury were justified in drawing from it, we are of the opinion that the promise of the defendant to pay the old balance of $118.63, was not within the statute of frauds, and therefore, it was not necessary that the promise be in writing in order to be binding. Kee v. Cahill, 86 Ill. App. 561; Peters v. Raven, 159 Ill. App. 122; Clifford v. Luhring, 69 Ill. 401; Borchsenius v. Canutson, 100 Ill. 82.

The defendant complains of the action of the trial court in giving certain instructions and refusing to give certain other instructions which he submitted. This contention with regard to the instructions, involves the position which the defendant takes with regard to this matter of the statute of frauds, and what we have said as to that latter contention disposes of the further contention referring to the instructions.

In the course of the trial the court received in evidence certain pages from a day book kept in the meat market of the plaintiff by his wife. The defendant contends that his objection to this evidence should have been sustained, on the ground that the entries appearing on these pages were not such as to constitute a book account, as contemplated by the statute. From an inspection of these pages as they were received in evidence, it is apparent that they do not present an example of expert bookkeeping, and it is clear that they were kept in a rather crude manner. But we do not feel they are open to the objections urged by the defendant in support of his position on this question. The pages are all headed "New Paradise." They contain a series of dates, opposite which there is a series of amounts. No dollar signs appear, and in many instances decimal points are omitted, but it is perfectly clear that these amounts appearing on these pages represent dollars and cents. We do not believe any reasonable person could examine them and possibly reach any other conclusion. There can be no doubt of it, when the other evidence is considered. It is true that the testimony submitted in behalf of the plaintiff, on the question of the delivery of meats covered by the items in this day book, might have been rather better knit together than it appears in this record. But, in our opinion, sufficient appears to justify the conclusion that the merchandise covered by these items was delivered to the New Paradise Restaurant. The plaintiff and his wife testified that orders would come in from the restaurant, from time to time, and as they came in they would be

put up and delivered, usually by the delivery boy. The plaintiff testified that the items appearing in the day book were all written by his wife except one at the end, which appeared to be a total, reading:

"Gottlieb

Statement rendered..... 473.97

Old balance 118.63

592.60"

This was in the handwriting of an accountant who testified in the case, to the effect that he had submitted the statement to the defendant at the time these totals were figured up by him, and noted on the day book. The plaintiff testified that his wife got the prices for these items from him and he was present whenever she made these entries in the day book. He was then asked: "And you know at the time she put them there she put in the prices you told her to put in?" and he answered, "Yes". He was then asked: "And you know this is a true and correct account of the bills charged to the New Paradise Restaurant on North Avenue there?" and he answered, "Yes Sir." Such being the showing made by the plaintiff with regard to these pages from the day book, kept in his market, we are of the opinion the trial court properly admitted them.

The defendant makes the further contention that the judgment recovered by the plaintiff fails to take account of the credits admitted by the plaintiff in his statement of claim, aggregating $170.51. On the statement attached to the plaintiff's statement of claim, the items claimed by him to be due from the defendant, are added up and their aggregate

is there stated to be $603.80. However, this addition is an error. When those items are correctly computed they give a total of $726.80. The day book put in evidence by the plaintiff contains two items not included in this statement attached to the statement of claim, - one of $15.00 and the other of $21.41. When the plaintiff's evidence was being put in, no point was made against those two items. When they are added in, the total comes to be $763.21. This includes charges making up two items of credit admitted by the plaintiff in his statement of claim,- one of $63.86 and the other of $56.75. There should also be another item of credit amounting to $50.00. All of these credit items are properly accounted for in the day book. They total $170.61. When that amount is deducted from the total of the charge items above referred to, amounting to $763.21, we get $593.60, which is exactly the balance shown by the last item in the day book. That, with interest, would amount to more than the judgment recovered by the plaintiff, which is within the ad damnum alleged in the statement of claim.

We find no error in the record, and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

270 - 31090

FRANK J. DOUGLASS,
Appellee,

v.

CHICAGO MOTOR COACH COMPANY, a corp.,
Appellant.

243 I.A. 630

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Dec. 29, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Douglass brought this action on the case against the defendant Coach Company, to recover damages for injuries he alleged he had received in a collision between an automobile he was driving and one of the defendant's coaches and a third automobile. The issues formed by the pleadings were submitted to a jury, resulting in a verdict finding the issues for the plaintiff and assessing his damages at the sum of $3,000. Judgment for that amount was entered on the verdict, and the defendant has perfected this appeal.

The occurrence in question happened about nine or ten o'clock in the evening on May 18, 1924, on Sheridan Road a short distance south of where that street crosses Montrose Avenue and Broadway in the City of Chicago. The evidence shows that the traffic in Sheridan Road was somewhat heavy. There were two lines of automobiles proceeding south in Sheridan Road on the west side of the street and two lines proceeding north on the east side. There was an automobile

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Opinion filed Dec. 20, 1938.

parked at the west curb near the point where this accident happened. The plaintiff was driving his car, which was a four passenger open Cadillac, south in the line of traffic near the center of the street. When the plaintiff was about thirty feet from the parked car, a motor coach came up from behind, passed him on the right, and cut across in front of him, apparently to clear the parked car. The plaintiff testified that when the coach turned across his path the right front fender of his car came in contact with it about the middle of the coach, from center to back. The effect of this was to cause the plaintiff's car to swerve to the left, beyond the center of the street. There it just cleared a car which was being driven north, and collided with the next car in that line of north bound traffic. This second collision had the effect of swerving the two cars around and twisting the steering wheel of plaintiff's car. One of the spokes of the steering wheel struck the plaintiff's right hand across the fingers, causing fractures in the bones of two of his fingers. The motor coach did not stop but proceeded on to the south. No report of the accident was ever made to the defendant company by any of its employees and although the claim department of the defendant company was advised of plaintiff's claim not long after the accident is alleged to have happened, its inquiry among its employees failed to develop any information to the effect that any such accident had taken place.

The defendant contends that the evidence shows the plaintiff to have been guilty of contributory negligence and that the defendant's servants were not guilty of any negligence, both as a matter of law and as a matter of fact.

The plaintiff testified that the southbound traffic had been halted at the intersection just to the north of the place of the accident, and when he reached the latter point he was proceeding at the speed of the traffic, which was 18 to 20 miles an hour. The nearest car ahead of the plaintiff was 20 or 30 feet away. The plaintiff was driving with one hand, - his left, - resting on the steering wheel. He noticed the car parked at the curb, a littlesahead of him, and he testified that at that moment "a bus came along on my right coming along much faster than I was, and, without any warning or anything, got across in front of me and pushed against my front end and threw me across another car coming in the opposite direction and I slammed into it." He stated that when this happened he was about 30 feet north of the parked car. He further testified that he thought his own car did not move 20 feet "from the time I saw him start to cut in until I had my machine cut dead. * * * I had one hand on the wheel until I had to apply my brakes suddenly and then I instantly grabbed the wheel with both hands and jumped on the brake." He also stated that when his front wheel struck the other car "it spun the wheel and spun the steering wheel." He said that he heard no warning signal from the motor coach. In making the contentions now under consideration, the defendant relies particularly on that part of the plaintiff's testimony where he stated that he saw that the southbound traffic was moving in a single line as it passed the parked car and that he knew that the south bound traffic which was in the line to his right, "would come out and get in front of me. * * * I knew that was the way they were going so I was watching out for that."

One McDonald, who was driving the northbound car with which the plaintiff collided, testified that he did not see the coach before the accident happened, - that the first thing he saw of it was when the coach swung out of the traffic and then the side of the bus hit Douglass' car which ran into his. He testified that the bus passed his car to the south"with about a clearance of a foot, and when the bus came out it threw him (Douglass) right into me * * * The bus had not passed me when the Douglass machine was into mine. * * * I didn't see the bus hit Douglass' car - I heard it."

Two or three policemen were at the intersection of Montrose avenue and Sheridan road. They did not see the accident but heard the sound of a crash and immediately went to the place from which the sound had come. Two of them testified. They said that the traffic in Sheridan road at the time was very heavy, with two lines of traffic going in each direction. They described the positions of the cars when they reached the scene of the accident. One of them was asked whether he saw a Chicago Motor Coach there and he said he did not.

The first car behind the plaintiff's car in the southbound traffic, was being driven by one Hall. He testified that his car was about 15 or 20 feet behind the plaintiff's; that the traffic was "pretty crowded"; that he saw Douglass' machine drive toward the middle of the street, and when it collided with McDonald's car it threw the latter around into collision with Hall's car. Hall testified that he saw "a motor bus pass by me a couple of seconds before it happened," and

"after my car had been hit, then I noticed the motor bus somewhere down along the street." He stated that Douglass was driving at the same rate of speed at which he was driving - 15 to 20 miles an hour.

The defendant had no occurrence witnesses to offer for the reasons we have referred to. On the foregoing testimony, which is the substance of all that was presented relating to the questions of negligence and contributory negligence at the time of the occurrence, we are of the opinion that the trial court properly left these questions to the jury for their determination; and we are further of the opinion that it could not be said by this court that the finding of the jury was against the manifest weight of the evidence; either on the issue of contributory negligence or of negligence. In contending the contrary the defendant has called our attention to Sullivan v. Ohlhaver, 301 Ill. 369, which involved a collision between an automobile truck and another car. In that case two automobiles were parked at the side of the street and the truck was approaching them from their rear. As the truck reached the point where the cars were parked, the one nearest the truck suddenly started up and drove out into the roadway, when the truck came into violent contact with it, throwing it over against the other parked car, injuring its owner, who was standing behind it, lighting its rear light. In the course of its opinion in that case the court said that the driver of the truck was bound to use reasonable and ordinary care; that "he was bound to anticipate that the cars parked at the curb might turn into the street; and to keep a proper look-out for them and use care to have his

truck under such control as to enable him to avoid collision." That is not at all the situation involved in the case at bar. In the Sullivan case all that the court charged the driver of the truck with, was the obligation of anticipating what might occur, as indicated by what was in sight, out in front of him in full view. Applying what the court said in that case to the case at bar, it may be said that in proceeding along Sheridan road at the point where this accident occurred, Douglass was bound to note the fact that he was approaching a parked car, and that there was some necessary intermingling of the southbound traffic at the point where it was passing the parked car; and so control his own car as to avoid colliding with any of the others; but he was not bound to anticipate that a motor bus or any other vehicle, would come by him at a speed "much faster" than the rest of the traffic, in face of the situation occasioned by the parked car, and without any warning swing out in front of all the southbound traffic and practically to the center of the roadway. At any rate the question of proximate cause was for the jury. Reitling v. C. R. I. & P. R.R. Co., 252 Ill. 466.

The defendant contends also that the collision of the motor coach with the plaintiff's car was not the proximate cause of the injury which the plaintiff suffered; but that the most that can be said is that the collision between the coach and the plaintiff's car "furnished a condition by which the injury to the plaintiff's hand was made possible," and such injury was proximately caused by the collision of the plaintiff's car with McDonald's car. In this connection counsel cites Jenkins v. La Salle County Coal Company, 264 Ill. 338,

and that decision is quoted to the effect that "to constitute proximate cause, the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence." With that as a basis, counsel proceeds to argue that on the facts in the case at bar, no ordinarily prudent person could have foreseen that the fingers of plaintiff's right hand would be broken when struck by his steering wheel, as a result of a collision of his car with another car, after it had first come in contact with the motor coach. In the Jenkins case, the plaintiff was employed in a coal mine and his duty was to run loaded cars onto a cage at the bottom of the coal-shaft to be raised to the surface and to run empty cars which were lowered to the bottom of the shaft floor, from the cage into the mine. On the occasion there involved, an empty car had been lowered and the cage had bumped the car off the track when it reached the bottom of the shaft. In attempting to adjust the car, a wheel fell off because of the lack of a linch-pin through the axle to hold it on, and it rolled through into the other compartment of the shaft and to the bottom of the shaft, the cage in that compartment then being at the top of the shaft. The plaintiff reached in to get the wheel, and in doing so extended his arm and head inside the shaft, and as he did so, he was struck on the head by a piece of falling rock or coal, receiving the injuries complained of. The negligence charged against the Coal Company in that case was that it permitted one of its cars to be in an unsafe condi-

tion for use, in that it was not equipped with a linch-pin to prevent the wheel from coming off. The court held in effect that to constitute proximate cause of negligence, the injury suffered must be shown by the evidence to have been the usual and probable consequence of the negligence and such as an ordinarily prudent person might foresee might probably occur as a result of the negligence; and that applying that to the facts involved, it was of the opinion that there was no casual connection between the absence of the linch-pin and the falling of the object in the shaft. In our opinion, the application of the principle announced by the court in the Jenkins case, to the facts presented here, leads to a conclusion opposite to the one reached in that case, by reason of the different situation of fact presented. In the Jenkins case there was, of course, no causal connection between the absence of a linch-pin and the falling of a rock or piece of coal down the shaft. However, in the case at bar we are of the opinion there was a causal connection between the act of the driver of the motor coach, in going across the southbound traffic without warning and at a speed greater than the southbound traffic was maintaining, and a collision between the coach and the southbound car in front of which it crossed over; and further, that an ordinarily prudent person should have foreseen that such an act might probably result in throwing the other car over into the east half of the roadway, or crowding it over there, which, in the condition of traffic then existing would almost certainly result in a collision with some vehicle in the northbound traffic. It is true that the nearest cause, in point of sequence, of the broken fingers was

the collision between the plaintiff's car and McDonald's, but that collision would never have happened but for the negligence of the driver of the motor coach in cutting across in front of the plaintiff and either pushing or crowding him into the path of the McDonald car. The negligence of the driver of the motor coach was the direct cause of both collisions. The fact that there was an interval of a moment or two between the two collisions does not change the situation. The evidence in this case shows that there was an unbroken sequence between the negligent act of the driver of the motor coach and the collision of plaintiff's car with McDonald's and the jerking or spinning of plaintiff's steering wheel, causing the injuries complained of.

A further contention is made in support of the appeal, to the effect that the verdict is excessive. The plaintiff was in the heat contracting business. In the course of that business, his concern, in bidding on the installation of the heating plants in large buildings, would take the architect's drawings, and it was part of the plaintiff's duty to make tracings from those drawings, in connection with the figuring that was done on the bids submitted. The plaintiff testified, and medical testimony was submitted in support of his testimony, that the result of this injury was to leave his right hand so that he could not close it as he could before the accident, but that now when he closed it, the first two fingers would pivot toward each other, so that when the hand was closed they overlapped to some extent, and further, that those fingers were thick and clumsy, so that the plaintiff was not able to handle a drawing pen, as he had been in the habit of doing previously;

and that since the accident, when he attempted to do that kind of work, the drawing pen would wobble or turn so as to release the ink and smear up the drawing; that since the accident there had been "no feeling or control and the pen will turn suddenly in my hand. I can't get the right grip on the pen to draw a straight line. Since the happening of the accident I have tried to do that character of work a dozen, twenty times, thirty times probably," but these efforts had not been successful. He testified that his salary was the same as it had been previous to the accident. Other testimony was to the effect that the condition of the plaintiff's hand as it was at the time of the trial, wasprobably permanent. In our opinion, it may not successfully be contended that the damages assessed were excessive.

The defendant filed a plea of non-ownership, and contends that the plaintiff failed to show that the motor bus involved in this accident was one of the defendant's busses. In our opinion, there is no merit to this contention. The plaintiff did say that this occurrence happened so quickly that he didn't have time to see the motor coach clearly, - that he didn't see any name on it, but he testified that he was familiar with the Chicago Motor Coach busses, and that the one which came into collision with him "was just one of those two deck, two story busses. * * * The bus got by me before I got a chance to look at it. * * * It was dark brown in color as far as I can remember it." On cross-examination some reference was made to busses operated on Sheridan Road by the Edgewater

Beach Hotel. On re-direct examination, plaintiff was questioned again as to the appearance of the Hotel busses and of the Chicago Motor Coach busses, and no one can read his testimony without concluding that he was quite familiar with both types and that he was positive that it was not a Hotel bus. In this connection the defendant seems to attempt to support its argument by pointing out that McDonald testified that the bus was a green bus, although he also stated that it was one of defendant's standard busses, but there was no "second story" on it. From the cross-examination of this witness, it would seem that what he meant by the remark last referred to was that the top deck of the bus did not have a roof over it although it had seats on top. The witness Hall said that the bus that passed him "was a Chicago Motor bus,- it was a big double decker." This witness also said that the bus that passed him was a green bus, but he could not remember whether the top was enclosed or not.

The testimony submitted by the defendant itself was in conflict on this question of the color of the busses used by them at this time. Horne, defendant's superintendent of transportation, testified "we had double deck coaches painted green at that time." He further testified that some coaches which they operated along Sheridan Road at that time, were painted brown. Wainright, superintendent of the defendant's mechanical department of the north division, testified that they were using no green busses at that time but they were all brown. Gleanon, equipment clerk for the defendant testified to the same effect. Both

the latter witnesses, however, stated that the defendant had previously used green busses along this part of the route, but that previous to the time of the occurrence in question they had been transferred to other routes. This accident happened at night. The evidence is all to the effect that the bus did not stop, and an occurrence happening as the evidence shows this one did, was such as to draw attention most immediately to the three automobiles involved, rather than the coach which had disappeared, as they were standing there after the accident was over. That one witness would give as his recollection that the coach was brown, and another that it was green, the defendant having coaches of both colors, is not surprising; even assuming the fact to be that no green busses were being used at that time over that route.

Complaint is made of the action of the trial court in instructing the jury to the effect that "the drivers of automobile trucks and motor coaches, while using the public highways in this State, are bound by law to use ordinary care to avoid collisions with automobiles lawfully upon and using said highways." Counsel for the plaintiff in the brief filed by him in reply to the defendant's brief, says nothing in answer to the defendant's complaint about this instruction. We are of the opinion that the instruction might better have been omitted. It is an abstract proposition and was not applied to the facts in any way by the court. In our opinion, such an instruction is quite apt to be misleading. There is no connection between it and the instruction

immediately preceding it or the one following it. Such an instruction, isolated as this one was, is apt to be taken by the jury as an inference that drivers of automobile trucks and motor coaches are bound by law to use the degree of care referred to in the instruction to avoid collision with automobiles, and that the degree of care thus required by the law, of drivers of trucks and coaches is something greater than that required by the law of the drivers of ordinary automobiles. If this were a close case on the facts, which it does not appear to us to be, we would consider the giving of this instruction as a more serious matter, but in view of all the evidence in this record, we do not believe we would be justified in disturbing the verdict for this reason.

The defendant submitted a long instruction reciting a series of facts and telling the jury that if they believed from the evidence under the instructions of the court, that such facts were established, and that in the light of those facts, if they believed that the defendant did not use ordinary care as defined in the instructions, and that his failure to use such care was the proximate cause or contributed proximately thereto, then there could be no recovery. The defendant contends that the trial court erred in refusing this instruction. In our opinion the instruction was properly refused. Such an instruction should include all the facts involved in the occurrence, and, as submitted, this instruction omitted some of the materials facts. Such as, for example, the fact that the coach involved came up from the plaintiff's

rear, at a speed faster than he was going, and without warning cut across in front of him. The instruction was, in other respects, misleading and did not fit the facts shown by the evidence.

For the reasons we have stated, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

3 - 30375

RICHARD C. MAZER,
Plaintiff in Error,

v.

JAMES H. DALBY, FIDELIO F. BROWN, FRANK M. RYAN, and MARY A. LANDON,
Defendants in Error.

243 I.A. 630
ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 9, 1925, the court sustained the separate general demurrers of the defendants, Frank M. Ryan and Mary A. Landon, to plaintiff's amended declaration, and, plaintiff electing to stand by it, adjudged that all defendants go hence without day and recover their costs. It is sought by this writ of error to reverse the judgment.

The action, commenced December 16, 1924, is in case, and is based upon the provisions of the Illinois Securities Law of 1919, otherwise known as the "Blue Sky Law." All defendants were served with process and appeared, but Dalby and Brown did not demur or plead to plaintiff's original or amended declaration. As to defendants, Ryan and Landon, the sole question is whether plaintiff's amended declaration, or either count thereof, states a good cause of action.

In the first count it is alleged that on June 18, 1920, the Elgin Rubber Ace Co. was an Illinois corporation, with an authorized capital stock of $150,000, divided into 1500 shares of the par value of $100 per share, and having its principal office at Elgin, Illinois; that the four defendants, together with T. E. Ryan (now deceased) were the duly elected and acting directors of the company and constituted its board of directors; that the

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shares of stock of the company were "Class D" securities, as classified in the Illinois Securities Law, and that on or prior to said date the company had not filed with the Secretary of State any of the documents required to be filed under section 9 of said law, and had not complied with the provisions thereof relating to the sale or offering for sale of such securities, all of which defendants well knew; that, although the company had not complied with the provisions of the law, yet it, on June 18, 1920, "was selling by its president, T. E. Ryan, and offering for sale," some of its stock, and that on said day the company, "through its said president, T. E. Ryan, and through the defendants, Dalby and Brown," sold to plaintiff 50 shares of the treasury stock of the company, for which plaintiff paid the sum of $5,000; that "it became and was the duty of the defendants, as directors," of the company, "to exercise ordinary care as such directors," and that if the defendants had exercised ordinary care they would have known that the company was selling stock in violation of said law, and "it would then and there have been the duty of defendants to have prevented the sales of said stock," but the defendants "wholly neglected their duty in that behalf and wholly failed to exercise ordinary care" in and about the performance of their office as directors, whereby plaintiff was induced to purchase said stock, he not knowing that the company had failed to comply with the provisions of the law; that on December 9, 1922, the company was adjudicated a bankrupt; that plaintiff hereby offers to return to the defendants said 50 shares of stock; and that by reason of the negligence of the defendants plaintiff has sustained damage in the sum of $5,000.

In the second count the preliminary allegations are substantially the same as in the first. It is then alleged that

the plaintiff did not know that the company had failed to comply with the provisions of said law, and that he was induced by the company, "through its president and through its directors, Dalby and Brown," to purchase said 50 shares and to pay to the company therefor the sum of $5,000; that said sale "was unlawful and contrary to the provisions of" said law; that, "by reason of defendants being directors" of the company, "it became and was their duty to exercise ordinary care in and about the performance of the office of directors, and that if the defendants had exercised ordinary care they would have known that said corporation was selling stock in violation of the Illinois Securities Law, and it would have thereupon been the duty of defendants to have prevented said violation, * * but they wholly neglected their duty in that behalf and failed to exercise ordinary care in and about the performance of their office as directors;" and that by reason of said negligence plaintiff has sustained damage, etc.

We think it clear that plaintiff's action is based solely upon the alleged violation of said Securities Law of 1919. Section 37 of that Law, before its amendment in 1921, reads as follows: (Hurd's Stat. 1919, Chap. 121a, Sec. 113):

> "Every sale and contract of sale made in violation of any of the provisions of this act shall be void, and the seller of the securities so sold and each and every solicitor, agent or broker of or for such seller, who shall have knowingly performed any act or in any way furthered such sale, shall be jointly and severally liable, upon tender to the seller or in court of the securities sold, to the purchaser for the amount paid, together with his reasonable attorney's fees in any action brought to recover such amount."

In both counts of the declaration it is alleged that at the time of the sale of the Class "B" securities in question to plaintiff on June 18, 1920, the company had not complied with the provisions of section 9 of said Securities Law, and that the sale was made by th company "through its president, T. E. Ryan, and through the defendant

Dalby and Brown," who were then directors of the company. It is not alleged in either count that the defendants, Frank M. Ryan and Mary A. Landon, then also directors of the company, in any way participated in, or assisted in making, the sale, nor are any facts stated showing that they "knowingly performed any act or in any way furthered such sale." While it is alleged in substance that the defendants, including said Frank M. Ryan and Mary A. Landon, as directors of the company, failed to exercise ordinary care, etc., and that it was their duty as such directors to have prevented the sale and that they negligently failed to perform that duty, yet, as to said Ryan and Landon, we do not think that sufficient facts are stated disclosing such a duty on their part as alleged (McAndrews v. Chicago, etc., R. Co., 222 Ill. 252, 257; Ramsay v. Tuthill Material Co., 295 Ill. 395, 398); or disclosing any liability on their part to plaintiff under the statute or at common law. In Peck v. Cooper, 8 Ill. App. 403, 408, it is said: "The mere fact that a person is a director and stockholder in a corporation does not render him liable for the torts of the corporation or its agents. Some knowledge of and participation in the act claimed to be tortious must be brought home to him." In our opinion the court was warranted in sustaining the separate demurrers of Frank M. Ryan and Mary A. Landon to plaintiff's amended declaration, and, upon his electing to stand by it, in entering judgment in their favor for costs.

But we are also of the opinion that the court erred in entering judgment against plaintiff for costs as to the defendants, Dalby and Brown. We think that the amended declaration stated a good cause of action against them under the statute mentioned.

Accordingly the judgment of the Superior court in favor

of defendants, Ryan and Landon, is affirmed, but the judgment against plaintiff for costs in favor of defendants, Dalby and Brown, is reversed and the cause is remanded for further proceedings as to them.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

Fitch and Barnes, JJ., concur.

528 - 30792

243 I.A. 631

FRED LEISER,
Appellee,

v.

CHARLES BALTZ,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a decree rendered by the Superior court on February 2, 1925, wherein, after a protracted hearing before the chancellor, it was ordered that the cause be referred to a master in chancery to take an account of the business dealings and transactions between the parties during the years 1917 to 1920, inclusive; that they produce before the master books, correspondence and other writings and that evidence be heard, etc.; and that whatever balance shall appear to be due from either party to the other shall be paid within 20 days after the master's report shall have been confirmed.

Complainant, a resident of Orangeville, Illinois, was in the business of making and selling cheese. Defendant was engaged, and had been for about fifty years, in the wholesale cheese business at Chicago. Complainant first met defendant at a cheese-makers' convention in February or March, 1917, at Monroe, Wisconsin, and thereafter they had continuous business relations for about four years.

The cause was heard upon complainant's original bill (as afterwards amended) praying for an accounting and filed May 24, 1922, and upon his supplemental bill, and upon defendant's answers thereto. On November 2, 1922, defendant filed a cross-

bill, in which he prayed that "all the dealings and transactions" between the parties "may be adjusted and their respective rights ascertained," and that complainant be decreed to pay to defendant whatever sum shall appear to be due. On April 14, 1923, this cross-bill, after answer, was ordered dismissed upon defendant's motion. In his answer to complainant's supplemental bill it is alleged that said cross-bill "was filed through a misapprehension of the facts and law existing."

In the decree the court found that in the spring of 1917, the parties made an agreement, whereby complainant undertook to sell and defendant to buy all cheese produced by complainant at his factories; that defendant was to pay the price per pound then prevailing in complainant's district; that during the years 1917 to 1920, inclusive, complainant sold and shipped to defendant large quantities of cheese; that defendant undertook to keep a true and full record and account thereof, and to pay complainant promptly upon receipt of each shipment; that in accounting and remitting defendant failed to keep the transactions under the agreement separate and distinct from other transactions under other agreements; and that "upon said cheese from complainant's factories there has been between the parties no full and final accounting or settlement."

The court further found that in July, 1917, the parties entered into another agreement whereby defendant undertook to purchase cheese made by producers other than complainant near Orangeville, Illinois; that complainant was to attend to the purchasing and shipping, and defendant was to advance all funds for the purchase, freight and carrying charges of the same, and solely attend to the marketing and selling; that upon defendant's sales the total cost was to be computed by adding to the original pur-

chase price the freight, cartage and storage charges, 1/4 of a cent per pound for complainant's buying commission, and a like amount for defendant's selling commission, and "the difference between said total cost and the selling price was to be divided equally between the parties;" that this agreement, from its inception and up to October, 1919, was acted upon, and, pursuant to its terms, defendant kept a record of all cheese purchased and sold, but did not give reports of all transactions; and that there has been "no full and final accounting or settlement" between the parties under this agreement.

And the court further found that during October, 1919, defendant employed complainant to act as defendant's agent in the purchase of cheese in the Orangeville district; that it was agreed that complainant should make purchases as directed by defendant, but under complainant's discretion as to quality, and at prices in some instances as designated by defendant and in others at market prices; that, for his services as buyer, complainant was to receive a commission of 1/2 of a cent per pound upon all purchases, and defendant was to advance, or pay promptly upon receiving the shipment, all costs, including complainant's buying commission; that this agreement was acted upon until the end of the year 1920; that complainant at times advanced his own funds for the purchases; that defendant undertook to keep a record of them and to render to complainant full statements thereof, including the commissions, but did not do so; and that there has been no full and final accounting or settlement between the parties under this agreement.

And the court further found that various statements of account and checks were received by complainant from defendant with recitals therein purporting to effect a discharge of defendant for the periods and transactions which they undertook to cover,

but that complainant's receipt of such statements and his negotiation of such checks "were not complete and final settlements;" and that a just and true accounting between the parties "requires the consideration of all of their transactions during said periods * * in conformance with this decree."

In defendant's amended answer to the bill, while admitting the making and acting upon of the contracts made in the spring of 1917, and in October, 1919, as to cheese of "high quality," defendant denied that, as to the contract made in July, 1917, there was any agreement as to the division of any profits. And defendant alleges that from March, 1917, to the end of 1918, complainant shipped much cheese to the Monarch Refrigerating Co., at Chicago, for storage, and gave his note for advancements made by it; that finally the Monarch Co. refused to make further advancements and complainant, fearing declines in the market, "induced" defendant to purchase from him at the then market prices various shipments of cheese stored with the Monarch Co., and defendant paid to it the amounts it previously had loaned to complainant on said shipments, including interest and carrying charges; that some of the cheese so purchased by defendant was of poor quality and said advancements, interest, etc., together with shrinkage in the cheese, amounted to as much as the cheese was then worth; that as to all of complainant's cheese, so received by defendant from the Monarch Co., defendant made a full accounting to complainant, and on June 18, 1919, a complete settlement was had therefor and complainant accepted defendant's check for $3,103.85; that from said date until December 9, 1920, defendant from time to time advanced money to complainant upon various other shipments of cheese, which complainant had caused to be delivered to defendant to be stored for complainant's account; that the aggregate amount of defendant's ad-

vancements on such shipments was $29,084.72; that from time to time complainant sold this cheese to defendant at market prices, and the amounts realized were credited on defendant's advancements; that the aggregate amount of said sales was $27,910.29; that on December 9, 1920, a complete settlement was had, wherein it appeared that complainant was indebted to defendant in the sum of $1174.43; that in confirmation of this settlement said unpaid balance "is represented by certain notes given by complainant to defendant for advancements theretofore made, upon which notes judgment has heretofore been taken against complainant;" that "during all of the aforesaid times" complainant sold to defendant various other lots of cheese "in single transactions aggregating over 200 distinct transactions," being sales made direct to defendant, for each which separate sale defendant gave a check in full payment thereof; and that since said accounting and settlement of December 9, 1920, there have been a few additional transactions between the parties, and in each case the cheese sold has been paid for by defendant, and said payment has been accepted by complainant as a settlement of the particular transaction; and that subsequent to said settlement of December 9, 1920, defendant gave his check to complainant for $300, "which complainant requested and accepted in full satisfaction of every service theretofore rendered to defendant and every demand."

After defendant had filed his cross-bill and complainant his answer thereto, but before the cross-bill was dismissed, complainant on December 21, 192?, filed a supplemental bill, in which he referred to defendant's claim, as set forth in the cross-bill, viz, that there remained due from complainant to defendant the sum of $3340.58, upon four judgment notes, each payable

to defendant's order and each purporting to have been signed by complainant. The face of these notes aggregated $21,983.97. The first two were collateral judgment notes, payable on demand, - one being for $11,711.65, dated Chicago, January 2, 1920, and stating on its face that the maker (complainant) had deposited with defendant, "as collateral security for the payment of this and all other liabilities" of complainant to defendant, 49 tubs of Swiss cheese from complainant's factory, and giving power to defendant at any time at his discretion to sell the same at public or private sale, - and the other being for $9,022.32, dated Chicago, January 10, 1920, and stating on its face the deposit with defendant as collateral security under similar terms and conditions of "24 tubs Swiss cheese Pfund Factory." The last two notes were plain judgment notes, dated respectively, Chicago, July 28, 1920, and November 6, 1920, and each due 60 days after date, and being respectively for $750 and $500. It is not disputed that complainant executed and delivered these last two notes, but the execution of the first two notes is disputed. In the supplemental bill complainant alleged that, in September, 1922, (after the present action had been commenced and after defendant had filed his answer to the original bill) defendant caused a judgment by confession to be entered on said four notes against him for $3,340.58, and thereafter caused to be commenced in the circuit court of Stephenson County, Illinois, a garnishment proceeding on said judgment so confessed, wherein the People's State Bank of Orangeville, Illinois, was garnishee, and which proceeding was still pending. The supplemental bill prayed for an injunction restraining defendant, his agents and attorneys, from further proceeding in the garnishment action, or other action, to enforce

the collection of said judgment until further order, and that defendant be ordered to deposit said four notes with the clerk of the Superior court of Cook County, and to be with him impounded. On the same day (December 21, 1922) the court ordered that an injunction issue as prayed, but on January 30, 1923, the court, on motion of defendant, ordered that said injunction order be vacated. Subsequently, defendant filed an answer to the supplemental bill in which he alleged, among other things, that said judgment against complainant for $5340.58, on said four notes, remained in full force and effect and had not been paid, that complainant is indebted to him in the amount thereof as in said judgment notion was "found and determined," and that said judgment "is final."

After the taking of the evidence before the chancellor had been concluded, but before argument by counsel, one of the complainant's soliciters, on May 14, 1924, filed a sworn petition in which it was alleged that during said hearing there was introduced in evidence said two collateral judgment notes above mentioned for $11,711.65 and $9,022.32, and also two other collateral judgment notes, all purporting to be signed by complainant and payable to defendant's order, said two other notes being demand notes and dated respectively December 26, 1919, and December 31, 1919, and being for $5931.36 and $1117.34 respectively, - one secured by a deposit of 59½ boxes of Block Swiss Cheese from the Pleasant Valley Factory and the other secured by a similar deposit of 8 packages of cheese from the Plattner Factory; and that after several endeavors in April, 1924, said solicitor obtained possession of the four notes from defendant's solicitor and submitted the same to two handwriting experts who, after examination, expressed the opinion that the signatures of the maker were not the genuine sig-

natures of Fred Leiser. The prayer of the petition was that further evidence be taken in the cause, particularly the testimony of said experts on the question of the genuineness of complainant's signatures. It does not appear that the court took any action on the petition further than to enter an order on May 15, 1924, that said notes be impounded with the clerk of the court until further order. Complainant's testimony, previously given on the hearing, as to whether or not he actually signed said four notes, was uncertain and unsatisfactory. Although stating that said signatures looked like his, he finally denied executing the notes, and further stated that if he did sign them, he did not intentionally do so, and that his signatures were obtained improperly while he was under the influence of liquor.

On the hearing much oral and documentary evidence was introduced, including many letters and statements of account. The opposing witnesses' testimony was very conflicting on material points. Some of the evidence was not pertinent to the main question before the chancellor (whether an accounting between the parties should be awarded), although it might be appropriate and relevant on a hearing before a master on the taking of an account after one had been awarded.

In the early spring of 1917, when the parties first met, it was agreed verbally that complainant should sell to defendant at Chicago cheese produced in complainant's own factories from time to time at the prevailing market prices, and this agreement was acted upon until about the end of the year, 1920. And there was evidence tending to show that the actual shipments on defendant's account of cheese produced in complainant's factories aggregated for said period over 180,000 pounds. Some time in July, 1917, defendant solicited complainant to buy cheese

for him from other producers at or near Orangeville, Illinois, and a further verbal agreement was made as to such cheese, and it was acted upon until October, 1919, during which period complainant shipped more than 325,000 pounds of such cheese. According to complainant's version of this agreement he was to receive 1/4 of a cent per pound as a buying commission on all cheese purchased for defendant from other producers and the repayment of all his outlays made therefor; then defendant, after the cheese had been sold by him, was to add to the cost another 1/4 of a cent per pound as a selling commission to be received by him, and any profits on the transactions were to be divided equally between the parties; and defendant was to keep full and true accounts of the transactions. Defendant's version agrees with that of complainant's with one important exception, viz, that there was no agreement relating to any division of profits, and that all complainant was to receive was his commission and the repayment of his outlays.

The court in its decree found that this agreement was in substantial accord with complainant's version, and we cannot say that the finding is against the manifest weight of the evidence, as urged by defendant's counsel. Some of defendant's letters to complainant tend to sustain complainant's version. In his letter of August 3, 1917, he writes complainant: "Nine tubs of Swiss came in this afternoon and the Monarch will get them in and mail you a check tomorrow morning, if they can get the weights. * * The Monarch will send you an advance of 21¢ on the nine tubs. Of course you understand all this cheese goes into the bunch, you do the buying, I will do the selling, and we will split the profits." In his letter of August 4, 1917, he writes detailed instructions as to the buying and storage of cheese and as to the advances to be made by the Monarch Co., and further writes: "I have explained

everything to you; if you cannot read my letters, let your son read them to you so there is no misunderstanding. * * Nobody around Orangeville has got this kind of an arrangement. You understand I guaranteed you at this end. * * Tell your brother that you will advance him 21¢, you will store it for him and I will sell when he is ready to sell and the market suits him, and we will split the profits. * * If you are going to get his cheese, let me know because I made arrangements for so much money and, if we need more, I will have to make that arrangement. We can have from $250,000 to $300,000 now, and if we need more we can have it. We will advance from this end as the market advances." In his letter of September 24, 1917, he writes: "Enclosed find check for the one tub of Swiss and your brokerage. * * I went over there (Monarch Co.) last Friday and told them to send you a separate check, and as soon as they get this straightened they will send you 30¢ advance. If you can buy Block Swiss, they will advance you 28¢, and we will split the profits. Can you do anything in Limburg, they will advance you 22¢, and we will split the profits. * * You ship it direct to the Monarch Co., and I will see that you get the advance. * * If I could only make you understand to keep right on buying, we got a nice arrangement; if you follow my instructions we will make a bunch of money." Defendant testified on cross-examination: "I had no arrangement in 1917 and 1918 with Fred Leiser whereby he was to get one-fourth cent commission and I was to split profits. He talked about it and I talked about it, but we never agreed on it. I told him if he bought good cheese, and the market went up and we could make money above the buying cost and the selling cost, I would split profits. * * There never was any splitting of profits covering 1917 and 1918." Complainant's son, Fred E. Leiser, who at the time of the hearing was in

business in Montana, testified in substance that in September, 1917, he and his father called on Baltz at Chicago; that Baltz stated that complainant's buying of cheese for him was proving very satisfactory, that complainant was getting one-fourth cent commission and he (Baltz) was getting the same commission for selling and the profits would be divided, and that some of the cheese was being sold at a "nice profit," but that "it hadn't all been paid for yet and settlements would be coming forward;" that in October, 1918, he and his father again called on Baltz and demanded settlements for amounts claimed to be due to complainant; that Baltz said the settlements would soon be made, that complainant's buying of the cheese was going along "very nicely," and that they were making a lot of money, and on some of it "as much as 10 cents a pound;" that in October, 1919, he and his father again called on Baltz and a heated interview was had in the presence of other witnesses, at which his father (complainant) stated that amounts which were due him had not been paid and that he "was through" buying cheese at 1/4 of a cent per pound commission, and that he wanted that commission raised to 1/2 of a cent per pound, and that Baltz finally agreed to this and said he would in the future give complainant that additional rate of commission but "nothing more of the profits," and that complainant agreed to this change; that at this interview Baltz also stated that complainant had about $25,000 coming, but that he was unable for certain reasons then given to make an immediate settlement, but would later. Baltz denied that anything was said at this interview as to profits, or that he said that $20,000 or $25,000 profits were coming to complainant. In view of the evidence as above outlined and other evidence contained in the record, we are of the opinion that the chancellor was fully warranted in making the finding in

the decree, as to said agreement of July, 1917 (acted upon until October, 1919, when it was changed as shown) that "there has been no full and final accounting or settlement between the parties."

Counsel for defendant urge that the decree should be reversed because, although the allegations of complainant's bill stated such a case as would give a court of chancery jurisdiction, there had not been sufficient proof of facts as entitled complainant to relief in equity, and that he should have proceeded in a court of law. Counsel, however, state in their printed brief that "if, as complainant contends, there was a valid agreement to share profits and there never has been a complete settlement between the parties as to such transactions, we would agree that this might be a proper case for equitable cognizance; on the other hand, if complainant has failed to establish by a preponderance of the evidence the existence of such a contract, the only basis for equitable jurisdiction has failed and complainant should be relegated to a court of law for relief." In view of counsels' statement we think it is a sufficient answer to counsels' contention to say that we agree with the trial court that the evidence sufficiently shows that, under the agreement of July, 1917, which was acted upon until October, 1919, the parties contemplated a division of the net profits of the transactions thereunder, and that there never has been a full and final accounting or settlement as to said transactions or the profits thereof.

Counsel for defendant further contend that, because of the many settlements made by the parties from time to time during the progress of their numerous business transactions under the different agreements, the court erred in adjudging that an accounting should be taken before a master. In addition to the claimed settlements made on June 18, 1919, and on December 9,

1920, and one on a subsequent date (as set forth in defendant's amended answer), the evidence discloses that many other settlements of particular transactions were made from time to time, but we cannot discover that any final accounting and settlement was made as to all of the transactions. Defendant's position upon the hearing was in substance, as it is here, that the settlements of the hundred or more separate shipments, handled and closed as such, taken in connection with the more general settlements of June 18, 1919, August 8, 1919, January 2, 1920, January 12, 1920, and December 9, 1920, altogether amount to a final accounting and settlement of all the transactions. In view of the conflicting evidence, both oral and documentary, as to what transactions were in fact or intended to be included in said more general settlements, of the confusion existing in the accounts and statements, of the doubt disclosed on the question whether complainant in fact signed four of the judgment notes payable to defendant's order, as mentioned in the pleadings and appearing in the evidence, we are of the opinion that the chancellor was warranted in finding that there had not been a full and final accounting and settlement of all of the transactions had under any of the several agreements between the parties, and in decreeing that an accounting should be taken before the master as to the business dealings and transactions had between the parties during the years 1917 to 1920, inclusive, etc.

Accordingly the decree of the Superior Court of February 2, 1925, will be affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

42 - 31154

243 I.A. 631

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MIKE CARRAS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE CHIMLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Mike Carras seeks to reverse a judgment of the Municipal court, entered after verdict on November 27, 1925, wherein he was adjudged guilty of keeping a house of ill fame or assignation, etc., and sentenced to the House of Correction for six months and also to pay a fine of $200. The cause has here been consolidated for hearing with another writ of error (Case No. 31155) sued out by Sarah Espinosa to reverse a judgment of said court, entered after verdict on the same day, wherein she was adjudged guilty of being an inmate of a house of ill fame or assignation, etc., and sentenced to the House of Correction for thirty days and also to pay a fine of $50.

The proceedings against the two defendants were commenced by the presentation to the court on October 24, 1925, of separate informations, each signed by Patrick Gilhooley, a police officer, and verified by his affidavit of that date. Although the court granted leave to file the informations, the transcripts do not disclose that either information then was filed. Nevertheless both defendants were arrested and, on November 18, 1925, after arraignment and pleas of not guilty, the separate cases against them were tried together before the same jury. Evidently the two unfiled informations were before the court, for, at the beginning

of the trial, the defendants severally moved to quash them, but the motions were denied. And the court, upon motion of the State's attorney and over objection, granted leave to amend the Carras information on its face by adding certain words thereto, and to amend the Espinosa information on its face by inserting certain words therein, and these amendments were made on the face of the papers but it does not appear that the informations, as so amended, were re-sworn to, or re-verified, by the informant, Gilhooley. Thereupon the trial proceeded and witnesses testified, and, on the same day, the jury returned separate verdicts finding each defendant "guilty in manner and form as charged in the information herein." When these verdicts were returned the informations had not yet been filed. On November 27, 1925, the court, in each case, entered an order directing that "the information herein" be "hereby filed nunc pro tunc as of October 24, 1925;" and the court thereupon, after overruling the motions for a new trial and in arrest of judgment, entered the several judgments first above mentioned. In each transcript, following the judgment order, appears the amended information as having been filed on November 27th, nunc pro tunc as of October 24th. In the Carras information, as amended, it is stated:

> "Patrick Gilhooley, a resident of the City of Chicago, * * in his own proper person, * * gives the Court to be informed and understand that Mike Carras, heretofore, to wit: on the 23rd day of October, A. D. 1925, at the City of Chicago aforesaid, did then and there unlawfully keep and maintain a house of ill fame, or place for the practice of prostitution or lewdness to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, or did let a house, room or other premises for such purpose in violation of Par. 145, Chap. 38, R. S. - Cahill's - (a house of ill fame at 9140 Buffalo Ave., in the City of Chicago, County of Cook and State of Illinois, which said house was then and there a place and kept for the practice of prostitution, assignation and lewdness), contrary to the form of the Statute," etc.

In the Espinosa information, as amended, it is stated:

"Patrick Gilhooley, a resident of the City of Chicago, * * in his own proper person, * * gives the Court to be informed and understand that Sarah Espinosa, heretofore, to-wit; on the 23rd day of October, A. D. 192[illegible], at the City of Chicago aforesaid, was then and there unlawfully and wickedly an inmate of a house of ill fame or assignation, (at 9140 Buffalo Ave., in the City of Chicago, County of Cook and State of Illinois, which said house was) a place for the practice of fornication, prostitution or lewdness, in violation of Par. 146, Chap. 38, R. S. - Cahill's -, contrary to the form of the Statute," etc.

Each of these informations appears to have been signed by said Gilhooley, and following the signature in his affidavit, signed and sworn to before the clerk of said court on October 24, 1925, that he has "read the foregoing information by him subscribed and that the same is true." The amendments as made by the State's attorney in the informations are those within the parentheses as indicated.

The main point urged for a reversal of the several judgments is that they are not sustained by sufficient informations, and we are of the opinion that the point is well taken. The trials were had on the informations as amended, but after the amendments they were not again verified by the affidavit of the informant, Gilhooley. The judgments, therefore, cannot stand. (People v. Zlotnicki, 246 Ill. 185, 186; People v. Shockley, 311 Ill. 255, 257; People v. Blum, 172 Ill. App. 493, 495; People v. Minto, 318 Ill. 293, 295.) In the Zlotnicki case it is said: "The basis of the conviction is the amended information. When it was filed the original was abandoned. Section 27 of the Municipal Court Act requires an information presented by a person other than the State's attorney to be verified by such person's affidavit. The verification of the original information cannot be applied to the amended information."

As to the information against Sarah Espinosa, it is

otherwise defective and insufficient to support the judgment against her because it charges that the offense mentioned was committed "on the 23rd day of October, A. D. 192_." (People v. Weiss, 168 Ill. App. 502, 510; People v. Wagner, 172 Ill. App. 84, 86. Furthermore, by the use of the disjunctive "or", instead of the conjunctive "and", preceding the word "lewdness," the information was rendered uncertain and vulnerable to attack upon motion to quash; (People v. Jackson, 181 Ill. App. 713, 715; 1 Bishop Crim. Proc. Secs. 535, 536); and her motion to quash should have been sustained.

The judgment of the Municipal court against Mike Carras is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

43 - 31155

243 I.A. 631

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

SARAH ESPINOSA,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Sarah Espinosa seeks to reverse a judgment of the Municipal court, entered after verdict on November 27, 1925, wherein she was adjudged guilty of being an inmate of a house of ill fame or assignation, etc., and sentenced to the House of Correction for thirty days and also to pay a fine of $50. The cause has here been consolidated for hearing with another writ of error (Case No. 31154), sued out by Mike Carras to reverse a judgment of said court, entered after verdict on the same day, wherein he was adjudged guilty of keeping a house of ill fame or assignation, etc., and sentenced to the House of Correction for six months and also to pay a fine of $200.

For the reasons stated in the opinion this day filed in the Carras case (No. 31154) the judgment of the Municipal court against Sarah Espinosa is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

Z 413.4. 031

56 - 31179

243 I.A. 631

ESSIE WEIL,
Appellee,

v.

THOMPSON-STARRETT COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries sustained by plaintiff on the afternoon of October 19, 1923, a jury returned a verdict finding defendant guilty and assessing plaintiff's damages at $4,000. Plaintiff remitted $1,000 from the verdict, and the court, after overruling defendant's motion for a new trial, entered judgment against it for $3,000. This appeal followed.

Plaintiff's declaration consisted of two counts, but a demurrer was sustained to the second. In the first count she alleged in substance that defendant, a contractor, was engaged in constructing a certain building at the southwest corner of Jackson boulevard and Michigan avenue, public highways in Chicago, and had built and was maintaining for use by pedestrians a covered passageway with sidewalk and certain steps, on the south side of Jackson boulevard and east of the alley; that there was a driveway leading from Jackson boulevard into the building, used for the passage of trucks, and there were steps in the passageway down to and up from the driveway; that it was the duty of defendant to construct and keep and maintain said sidewalk and steps in said passageway in a good and safe condition, yet defendant, not regarding its duty, negligently allowed the same to be and remain in a bad and unsafe condition, "in that the boards on said steps

24.2.1.V. 637

were loose and improperly constructed;" and that, while plaintiff on the afternoon mentioned was passing along and upon said sidewalk and steps and was in the exercise of due care for her own safety, she, because of defendant's negligence, "necessarily and unavoidably tripped and stumbled on said steps," and fell down and injured her left ankle.

The main contention of defendant's counsel is that the verdict is manifestly against the weight of the evidence on the question of defendant's liability, and that because of this the trial court erred in refusing to grant defendant's motion for a new trial.

Plaintiff, as to the details of the accident, was the only witness called in her behalf and her testimony was contradicted on material points by defendant's witnesses. According to her testimony she walked east in the passageway, went down the steps on to the floor of the driveway, crossed it, and was in the act of ascending steps on the other side and in the passageway, when she fell and sprained her ankle, causing her much pain and to be confined at her home and away from her business affairs for about six months. On direct examination she testified: "I started up the one step and, * * just as I got one foot on, my foot slipped on a board that seemed to move away. * * There was a board and there was a hole. * * The board got away from me and my foot went into the hole and turned under me. * * The board was loose and when I stepped it moved. * * I tried to get up. There was a rail going up the steps. I held on to it but couldn't pull myself up, * * and a watchman saw me and came and helped me. * * I waited awhile and then I took a bus right there on the corner * * and went home." On cross-examination she testified: "After crossing the alley I stepped up on to a temporary walk adjacent to the building. * *

I believe it was a wooden walk. I didn't pay much attention. * * I had already walked down three or four steps, on to a driveway where trucks go in and out, and was going up the steps when I fell. * * I didn't pay much attention to the steps * * I had gotten up the steps and fell down again * * I don't know whether the hole was on the platform of the driveway or not. * * It was right at the bottom. * * It seemed near the center of the stairway." John T. McCushin, the watchman referred to by plaintiff in her direct examination, was one of defendant's witnesses. At the time of the trial he was living at Defiance, Ohio, and was not in defendant's employ. At the time of the accident he was working for defendant, "handling trucks going in and out of the building" over the driveway. His testimony was in substance that the driveway was about 50 feet east of alley; that he first saw plaintiff west of the driveway walking towards him and towards the driveway; that she was "limping" and "had some dust on her clothes;" that the witness asked her what had happened and if she was injured, and that she replied that she had fallen "back there;" that he told her to sit down and wait until he could notify the office; that he took her name and address and went into the building and at once notified M. J. McKay, defendant's timekeeper. McKay testified in substance that, immediately after McCushin informed him that a woman had been hurt, he went to the passageway, looked for the woman but that she had gone and that he could not find her; that immediately thereafter he examined the entire length of the sidewalk of the passageway and also the driveway and the steps; and that there were no holes or loose boards in the sidewalk, driveway or steps. Five other witnesses for defendant, its superintendent of construction, its civil engineer and another of its watchmen (all working at the building on the day plaintiff received her injuries and prior thereto), and two

police officers (assigned to special patrol duty during October 1923, on Jackson boulevard between Michigan avenue and the alley to the west, which took in frequent daily patrolling of said pas way) all testified to the effect that there were no holes or loo boards in the sidewalk or steps of the passageway, or in the driv way between the steps, on October 19, 1923, or prior thereto. Defendant's civil engineer, Kelisky, also testified in considerabl detail as to the particular construction of the sidewalk, steps an floor of the driveway, and his testimony tended to show that the same had been strongly and carefully constructed.

After a careful review of plaintiff's uncorroborated and somewhat uncertain testimony as to the happening of the accident, and considering all of the testimony of defendant's witnesses as above outlined, we are of the opinion that the jury's verdict is manifestly against the weight of the evidence, and that the trial court erred in not granting defendant's motion for a new trial. (Belden v. Innis, 84 Ill. 78, 79; Donelson v. East St. Louis R. Co., 235 id. 625, 628.)

Accordingly, the judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

6C - 31193

L. J. LESSER,
Appellee,

vs.

YELLOW CAB COMPANY,
a corporation,
Appellant.

243 I.A. 631

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damage to plaintiff's automobile, caused by its collision with defendant's taxicab about 8 o'clock p. m. on November 30, 1923, there was a verdict and judgment in favor of plaintiff for $306.77, and defendant appealed.

Plaintiff and two other witnesses in his behalf testified, but defendant did not introduce any evidence. The main contention of defendant's counsel is that the evidence is insufficient to sustain the verdict and judgment on the questions of the negligence of the driver of defendant's cab, and of the contributory negligence of plaintiff's chauffeur, who was driving plaintiff's limousine car at the time, but who, having left plaintiff's employ, could not be found and produced as a witness. The only eye witness to the accident who testified was Horace W. Wright, a mail carrier. His testimony was to the effect that he was standing in front of the main entrance of the Madison Park Hotel on Hyde Park boulevard, Chicago, talking to the doorman; that the hotel is on the northwest corner of said boulevard and Dorchester avenue, and that the entrance is on the north side of the boulevard; that across the street and near the south curb defendant's cab with other cabs and automobiles to the rear of it were parked, facing east; that plaintiff's car was moving east on the south side of the boulevard about 18 feet from the curb, and traveling at a speed of not more than 15 miles per hour and having its headlights burning; that when it was

nearly abreast of the rear of defendant's cab, the driver of the cab, suddenly and without giving any signal or warning, started it and turned it to the left, right in the path of plaintiff's car; that, although plaintiff's chauffeur turned his car sharply to the left, there was a collision and a crash; and that after the impact neither automobile moved to exceed 5 feet. Plaintiff testified that his car was a new one, when purchased during the preceding year, and was in good condition; that he inspected it about 2 hours after the collision and found it "badly jammed," requiring numerous repairs; that on the following morning it was taken to a repair-shop, operated by a man named Stearn, where it was repaired; and that he had paid Stearn's bill for the repairs amounting to $306.77. Under this undisputed testimony we think that the questions, whether the driver of defendant's cab was negligent and whether plaintiff's chauffeur under the circumstances was guilty of contributory negligence in allowing his car to collide with the cab, were for the jury to decide and that their verdict in plaintiff's favor should not be disturbed. (Sullivan v. Ohlhaver Co., 291 Ill. 389, 392).

And we do not think there is any merit in the further contention of defendant's counsel, viz, that plaintiff's damages were not sufficiently proved. Stearn, called as plaintiff's witness, was shown the itemized bill, amounting to $306.77 and dated December 8, 1923, which he had rendered plaintiff and which was marked "paid," and was about to testify as to the work done and as to the charges made therefor being the reasonable and customary charges, etc., when defendant's attorney asked him: "Is this a fair bill for the work you did?" Upon the witness replying in the affirmative, the attorney said that he would "admit the bill," had no objection to it, and was "not going to fight it." This statement and admission rendered unnecessary any further formal proof of the correctness of the bill or the extent of the damage done to plain-

tiff's car at the time of the collision. And we cannot say that the jury's verdict is contrary to the explicit instructions of the court, as counsel also urge.

Our conclusion is that the judgment appealed from should be affirmed, and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

98 - 31226

243 I.A. 632

LAURA M. CAREY,
Appellee,

v.

NATIONAL UNIVERSITY OF MUSIC,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment, entered June 7, 1926, in favor of plaintiff for the possession of certain premises in a forcible detainer proceeding. No bill of exceptions is contained in the transcript.

From the common law record it appears that on June 2, 1926, plaintiff filed a complaint stating that she was entitled to the possession of the premises, commonly known as 4427 Grand boulevard, Chicago, and that the "National University of Music" unlawfully withholds the possession from her. The bailiff's return discloses that the summons was served on the "National University of Music, a corporation," by delivery of the usual papers to a named agent thereof. On June 7, 1926, an attorney filed a special appearance as follows: "I hereby enter the special appearance of National University of Music, Incorporated, a corporation, and my special appearance as its attorney in the above cause" (entitled as Laura M. Carey v. National University of Music) "to dismiss said cause for want of jurisdiction on the ground that the defendant named in said cause is neither a natural nor an artificial person and does not constitute a legal entity." On the same day, the court, on motion of plaintiff, ordered that leave be given to "amend name of defendant to read, 'National University of Music, a corporation.'"

243 I.A. 032

Then follows the court's recital that on the same day "come the parties," and the cause "comes on in regular course for trial without a jury," resulting in the court finding the "National University of Music, a corporation, guilty of unlawfully withholding from the plaintiff the possession of the premises," etc.; then follows the statement that "defendant comes and moves the court for a new trial," which motion is denied, and also "moves the court in arrest of judgment," which motion is also denied; then follows the judgment of the court upon the finding, viz, that plaintiff have and recover of and from the defendant "National University of Music, a corporation," the possession of the premises, and her costs; then follows the recital that defendant prays an appeal, etc., which is allowed on condition that it file an appeal bond in the sum of $14,000 with security to be approved by the court within 5 days, and that defendant be allowed 30 days to file a bill of exceptions. On June 12, 1926, defendant's appeal bond, signed by "National University of Music, Inc., a corporation," by its president and secretary, and by two sureties, was presented and approved by the court and ordered filed, and the same was filed. Then follow certain subsequent orders, giving defendant further time to file its bill of exceptions. On July 7, 1926, the court ordered that plaintiff's motion on that day made, to vacate the order of June 12, 1926, approving said appeal bond, be "entered and continued to August 12, 1926." In the meantime defendant, on August 11, 1926, (one day before the time set for the hearing of said motion) filed in this appellate court the present "complete" transcript.

In the brief of the defendant's counsel it is stated that of the errors assigned defendant relies upon the following: (1) "That the name of defendant, as amended, is not the corporate name of the 'National University of Music, Incorporated,' a corporation,

whose special appearance was entered for the purpose of having the case dismissed for want of jurisdiction on the ground that the defendant named did not constitute a legal entity;" (2) "that no cause of action existed between the parties;" (3) "that the judgment is against the law;" and (4) "that the proceedings and trial were without due process of law in violation of section 2 of Article 2 of the Constitution of Illinois." As to the first and second assignments, in the absence of a bill of exceptions, it must be presumed that it sufficiently appeared on the trial that the "National University of Music," served with process, was the same corporation as the "National University of Music, Incorporated," and that a cause of action existed between the parties. Notwithstanding its limited appearance the transcript discloses that defendant corporation participated in a trial upon the merits, and after the finding against it made a motion for a new trial, and thereby it waived the misnomer, if any there was, and any question of the court's jurisdiction over it. (Duggan v. Smyser, 46 Ill. App. 39, 40; Hotchkiss v. Vanderpool Co., 139 id. 325, 338; Nicholas v. People, 165 Ill. 502, 504.) Furthermore, it prayed and was allowed an appeal from the judgment, and it filed an appeal bond in its claimed right name. As to the third and fourth assignments we find nothing in the present transcript to sustain them. In his brief as to the fourth assignment defendant's counsel argues that the court's order of July 7, 1926, continuing plaintiff's motion to vacate the prior order approving defendant's appeal bond until August 12, 1926, "suspends the order approving the appeal bond until the motion is disposed of," and that, hence, "the proceedings below are without due process of law." Assuming it to be true that the court's order of July 7, 1926, suspended its prior order approving the appeal bond, it is clear that the judgment

against defendant was not stayed or its finality affected, as was the case in Hosking v. Southern Pacific Co., 243 Ill. 320, 330, where within 30 days after the entry of a judgment in the municipal court a motion was made to vacate the judgment and said motion was continued for determination to a future date. And the present transcript discloses that subsequent to the entry of said order of July 7, 1926, the only "proceedings" were those of defendant itself, viz, the obtaining, evidently somewhat hastily, from the clerk of the municipal court of the present transcript of record (including said appeal bond) certified by him on August 11, 1926, and filing it on the same day in this appellate court, just prior to the day plaintiff's said motion had been set for hearing in the municipal court.

We find no error in the record affecting the validity of the judgment against defendant for the possession of the premises in question, and accordingly the judgment is affirmed.

AFFIRMED.

Mr. Justice Fitch concurs.

Mr. Justice Barnes specially concurring:

I think the judgment must stand in the absence of a plea in abatement.

original defendant was not stayed or [illegible] effected, as
was the case in Hawkins v. Maidstone Borough Co., 1969 1 All. ER.
330, where within 10 days after the entry of a judgment in the
county court a motion was made to vacate the judgment and notice
motion was continued for determination in a future date. And
the present circumstances disclosed some engagement to the entry of
civil order of July 7, 1966, the only "proceedings" were those of
defendant itself, viz, the application, evidently unopposed hereafter,
from the clerk of the municipal courts of the previous transcript of
record (including said appeal bond) certified by him on August 31,
1966, and filed in the same day in this appellate court, long
prior to the day plaintiff's said motion had been set for hearing
in the municipal court.

To find no error in the lower effecting the validity
of the judgment thereof pursuant to the provisions of the
provision in question, the alternatively the judgment is affirmed,
in part reversed and remanded.

Affirmed.

Reversed and remanded.

I think the judgment must stand in the absence of a
plea in abatement.

108 - 31237

CARAVETTA SHEEHAN COMPANY,
a corporation,
Plaintiff in Error,

v.

SANTO GAROFALO and JOSEPH R.
GAROFALO, doing business as
GAROFALO BROTHERS,
Defendants in Error.

243 I.A. 632
ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

On December 2, 1925, plaintiff commenced in the municipal court a 4th class action in contract to recover $145 of defendants for certain merchandise sold and delivered to them in April, 1925. Defendants admitted this indebtedness but filed a claim of set-off for $98.71. The cause was tried before the court without a jury, resulting in the court finding the issues on the set-off in favor of defendants and entering judgment in favor of plaintiff for the difference, $46.29. Plaintiff sued out the present writ of error and contends that the trial court erred in allowing the claimed set-off and that a judgment should be entered in this appellate court against defendants for $145.

It appears from the bill of exceptions or statement of facts that plaintiff corporation was in the business of selling macaroni, etc.; that John J. Sheehan was its president and Charles Caravetta, a son of Louis Caravetta, was its manager of sales, though not an officer of the company; and that defendants were in the wholesale grocery business in Chicago. The defendant, Santo Garofalo, testified in substance that for about a year he had been purchasing for defendants various lots of merchandise of plaintiff, for all of which defendants had made payment except the last lot amounting to $145;

2431.A: 632

that he made all purchases through Charles Caravetta; that during April, 1925, Harry Mazzuca, an employee of plaintiff, requested that defendants sell him certain goods on credit which defendants refused to do; that thereupon Charles Caravetta telephoned the witness and requested that defendants give credit to said Mazzuca for the goods, and stated that "the firm (plaintiff) would stand good for it;" that, relying upon Caravetta's said statement, defendants "gave goods and merchandise on credit to Harry Mazzuca in the amount of $98.71," which had not been paid for; and that thereafter, after demands made for payment, defendants sued Mazzuca in the municipal court for said amount, but service was not obtained on him as he had left plaintiff's employ. Charles Caravetta testified in substance that he never stated to Garofalo that, if defendants would give credit to Mazzuca for the goods, the plaintiff corporation would pay for them, but that he told Garofalo that he (Caravetta) "would personally be responsible for the bill of Harry Mazzuca up to $30 or $35."

We think that the court erred in allowing defendants' claim of set-off and in only entering judgment against them for $46.29. Even assuming that Caravetta promised that plaintiff, and not himself personally, would "stand good" for the bill of goods delivered to Mazzuca, we do not think that the promise can be enforced as against plaintiff under the provisions of our Statute of Frauds (Sec. 1, Chap. 59, Cahill's Stat. 1925, p. 1290.) The evidence does not disclose that there was any memorandum or note of the claimed promise in writing, signed by plaintiff or by any other person by it lawfully authorized. And we think that, under the evidence, the claimed promise was a collateral rather than an original one, in that credit was given to Mazzuca for the goods by defendants, they relying on Caravetta's claimed promise that

plaintiff would guarantee or "stand good" for the bill. The fact that defendants brought suit against Mazzuca to recover the value of the goods sold to him tends to show that they looked to him as their original debtor for said goods rather than plaintiff. Furthermore, it is not shown by the evidence that Caravotta had any authority to bind plaintiff in making the claimed promise to defendants, nor are facts disclosed from which such authority could reasonably be inferred by defendants.

For the reasons indicated the judgment of the municipal court for $46.29 in favor of plaintiff is reversed, and judgment will be entered here in favor of plaintiff and against the defendants, Santo Carofalo and Joseph R. Carofalo, doing business as Carofalo Brothers, in the sum of $145. All costs will be taxed against said defendants.

REVERSED AND JUDGMENT HERE IN FAVOR OF PLAINTIFF FOR $145.

Fitch and Barnes, JJ., concur.

19 - 31115

243 I.A. 632

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ROY GORNEY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was charged by an information with neglect and refusal to support and maintain his wife, in violation of par. 2 of the Criminal Code, Cahill's Ill. R. S. (1925).

He was tried before a jury, found guilty and sentenced to confinement in the house of correction for one year.

Much evidence was heard that has no direct bearing on the issues. The parties were married October 3, 1923, and the evidence covers their domestic relations from that time to the time of their separation August 6, 1925. Whatever differences or causes therefor or grounds for complaint that existed prior to March, 1925, when they were living on Ashland avenue, have no direct bearing on the issues, for during that interval from March until August 6, 1925, it does not sufficiently appear that defendant either neglected or refused to support his wife. She admits that between these dates they continued to live together and that he was working "off and on," and that he was contributing to her support. She admitted that prior to that time when he worked he gave her $25 to $27 a week of his weekly salary of $30, and that she paid the rent of $30 per month and $18 a week for their table expenses, but that for some time he

2+321.4. 632

did not work and she earned wages for their support until she left him and went to her sister's in March, 1924 until June, 1924, when they resumed marital life until they finally separated in August, 1925.

But inasmuch as they lived together on Ashland avenue from March to August, 1925, during which time they were evidently getting along on his contributions, prior conditions need not be considered. He claimed that during that interval, while he was working, she refused to get him his noon-day lunches and that he had to get them at a restaurant, and she claimed that on one occasion he came home to get a noon-day meal and she happened to be out shopping, but that he told her it would save her trouble and him time if he took his lunches at a restaurant and that he did so thereafter. There was evidently trouble over the matter, and there is intimation that there was another man in the case, which led up to their final quarrel on August 5, 1925. Their versions of these affairs are entirely different and irreconcilable. Neither is corroborated by another witness as to what was said or took place on either occasion further than that two of her sisters testified that on the day following the final separation she had a swollen cheek and black eye, she having testified he struck her and he having denied it. But it does not appear, at least satisfactorily that during such interval they did not get along on what he contributed, or that she was at any time during that interval, or prior thereto, left in destitute or necessitous circumstances, or that their separation on August 6 was due to any failure to provide for her support then or during that time. While she testified that he worked off and on in that interval, she claimed that he gave her only $5 a week, but did not testify that he did not contribute towards their living expenses during that time. He testified that he

until June 1934.

continued to give her his wages and paid her $30 on the last of July. The evidence upon neglect to support her is very frail and insufficient to establish guilt in that respect beyond a reasonable doubt, as was unquestionably necessary. (People v. Parks, 216 Ill. App. 529.)

The burden was on the People to show that he either neglected or refused to provide for her support, and that it was without reasonable cause, and that she was left in destitute and necessitous circumstances. There was no proof of any direct demand on him, or of refusal on his part to provide such support. It was said in People v. Honnecker, 281 Ill. 295, in which the defendant was prosecuted and convicted of a like offense: "The defendant provided a home for his wife and provided for her support and maintenance there, and there was no evidence * * * that the defendant was called upon and refused to contribute to her support * * * although she was dependent for maintenance on her own family, where she had voluntarily gone. Even if there was ample justification for her leaving him, the statutory offense of which he was convicted was not proven." Here the wife claims that on their separation she went to her sister to live, and that he told her to go there. But there is no proof that she ever called upon him thereafter and he refused to contribute to her support. In fact she states that she never spoke to him after their separation. There was, therefore, no proof of a refusal to provide for her support, and, as before stated, we do not think the evidence was sufficient to sustain the charge of neglect to so provide beyond a reasonable doubt.

But it is an essential element of the offense that such neglect should be "without reasonable cause." As to the ground of their separation they disagree. Both say that there was a

quarrel on August 5. She claims that he told her to go home to her sister, that he did not love her. He claims that she came home at eleven o'clock that night and refused to explain to him where she had gone, and that she refused to sleep with him or to maintain further the relations of wife, and told him to "go out and get your meals in the restaurant, and get the rest of your stuff in the restaurant;" that he did not tell her to go and live with her sister, but on the following morning asked her if she meant what she said on the 5th, that he should leave the house and she said: "You can get out, but if you don't, I will throw the clothes out on the back porch," and that he should take all his property, saying, "here is the bed and the dresser that your mother gave you, that belongs to you, take it along with you." She claimed that in her effort to prevent the expressman from taking out the furniture he struck her. He denied striking her. Whatever be the fact as to that it cannot be said from the evidence that the People sustained the burden of showing that there was neglect to provide support for her "without reasonable cause." If his version of the separation is correct, he was not guilty of the offense; and if hers is correct still the evidence is too meagre to show neglect to provide for her at the time of their separation, or such neglect without reasonable cause after their separation.

The evidence is too unsatisfactory to warrant the affirmance of the conviction. The judgment, therefore, is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

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243 I.A. 632

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

HAIG O. CARTOZIAN and BARTON HAIG CARTOZIAN,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Haig O. and Barton H. Cartozian, father and son, respectively, were convicted on trial before a jury of a conspiracy to obtain money, etc., of the Fidelity & Casualty Insurance Company of New York by false pretenses.

The father is an Armenian and dealer in oriental rugs. He lives and conducts his business in a building in Evanston. The son is seventeen years old and assists in the business when out of school. They claim that the store was burglarized in the early hours of August 4, 1925. Cartozian's stock was insured by said company against loss by burglary. Its investigator on the same day came to the store to check up the loss. He was assisted by the younger Cartozian and together they checked over the books, stock and certain invoices. In the preliminary report so prepared was included as part of the stock found missing sixty rugs valued at about $7500. These rugs were purchased of the Julian Importing Company of Chicago, twenty-five of them on July 6th, and thirty-five of them July 31, 1925. They were shipped to the firm of Cartozian & Gabriel, Milwaukee, Wisconsin, of which the elder Cartozian was a member. The invoices for these shipments were mailed or sent to Evanston. The first shipment was invoiced to said firm.

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Plaintiffs in Error.

Defendants in Error.

But as Cartozian was to contribute that shipment to said partnership he had the invoice corrected and made out to himself personally, sending Barton to have the change made.

The invoice of July 31 was also made out to Cartozian only. In making out the report or inventory the younger Cartozian had the stock represented by these invoices included as stock of the Evanston store he not knowing, as claimed by him, that such stock had been shipped to the Milwaukee store. The next day the elder Cartozian discovering that the invoice of July 6 had been so included, declared to the insurance investigator that it was a mistake. Just what was said on that occasion respecting the "mistake" and in what it consisted, became the subject of much controversy and dispute. But it is unnecessary that we should discuss the different versions or express our opinion as to which should have been adopted by the jury.

While the report as so made up still included the July 31 invoice as part of the Evanston stock, the elder Cartozian claimed to be ignorant of that fact until it was brought to his attention several days later. We need not go into the reasonableness of his explanation for silence on the matter after learning of the fact, or its bearing on the question of his guilt.

It was the theory of the State that there was no burglary, and that inclusion of the invoices of July 6 and July 31 as part of the Evanston stock was designedly made with intent to cheat and defraud the insurance company. But whatever be the fact as to defendants' guilt, - as to which, in view of remanding the case for another trial, we should not express an opinion - we are of the opinion that errors in the procedure were so prejudicial as to deprive them of a fair trial.

It appears that these same premises had been

burglarized in the previous February and that Cartozian recovered $4000 insurance from the same company for the loss he had incurred at that time. These facts came out as an incident to testimony of a preliminary nature in the course of the direct examination of defendant Barton Cartozian and another of defendants' witnesses. On cross examination of Barton the assistant state's attorney went into the details of the former burglary in a manner to impress the jury that it, too, was a "fake" burglary or robbery, and the recovery of said $4000 the result of a like fraudulent scheme. The court having overruled defendants' objections to going into the details of that affair, the prosecutor required the witness to repeat several times and stress the fact that loss from that "alleged robbery" was $4000 and fully paid, and then proceeded to draw out as suspicious circumstances that the witness was not at home when the robbery took place, the condition in which he found things on his return home, that he "went up and down and yelled for his father and went to the basement where he heard a low sound like moaning," but thought it was the dog in sleep; that he then called the police, and left it to them to discover his father "in a bath tub with a lot of beaver board over the bath tub."

Counsel for defendants several times insisted upon the impropriety of this examination, but the court yielded to the insistence of the state's attorney that "it was cross examination," as if there was no possible limit of the right thereunder and it might expand indefinitely in any direction. In other words, because it was incidentally referred to on direct examination that defendants had met Stott as the company's investigator, on the occasion of adjusting the loss from the former burglary, the prosecutor claimed the right under cross examination to go outside the range of that immaterial fact to develop, by insinuating

questions, details of the previous "alleged burglary" with the sole and manifest purpose of creating the impression that this was not the first "fake burglary" and fraudulent scheme to obtain insurance money for alleged loss of goods that had been resorted to by defendants.

That this was clearly the purpose of the prosecutor is disclosed by his subsequent cross examination of the father on the same subject and his intemperate speech to the jury. When on objection he was checked from going further into details of the former burglary on cross examination of the father - the court apparently changing its views on the subject - the prosecutor insisted on the right to "show the intent * * * in this class of cases." It was finally decided, after discussion in the court's chambers, that such evidence was inadmissible. This decision should have checked any further allusion to that testimony.

However, because it was not stricken from the record the prosecutor claimed the right to argue it. In doing so he commented on the payment of $4000 for a loss arising out of an "alleged robbery where a couple of fellows tied up the old man and put him in a bath tub," but did not know "whether they took him in a pillow or not." The court sustained objection to the argument at this point, relating to "a pillow," but the attorney was permitted to continue his comments on other surrounding features of the burglary, saying that Cartozian's dog was not disturbed by the burglary and "must have had laryngitis, or something like that, because he couldn't bark that night." The court then reminded counsel that the jury would be better educated if he kept within the particular case. The reminder was not heeded for counsel continued his comments on the former "alleged robbery," and concluded with the statement that Cartozian since coming to America,

[illegible] penalty of the previous "alleged burglary" with the [illegible], despite the fact that [illegible] had been [illegible] made and manifest purpose of executing the intercession that this was not the first "time burglary" and [illegible] scheme to [illegible] the particular case". The testimony was that [illegible] [illegible] [illegible]

"has prospered and waxed fat," and that "if the law had not laid its hands on Cartozian for another two years he would have had regular stores all over the country. His merchandise was not costing him a cent." Stating then that he was "only a young, green fellow, new at the game," he climaxed these errors with another, saying: "Personally I am sold 100% on their guilt." Here, on exception to the remark, the court warned the jury to pay no attention to the prosecutor's personal convictions, and the latter then withdrew the remark. But the damage had been done.

We have thus given lengthy reference to the testimony and argument, which the court erroneously permitted after repeated and emphatic objections, because of their manifestly prejudicial character and the helplessness of defendants to meet the unfair and unwarranted insinuations of their guilt of a similar offense. They were not on trial for a former offense, if any existed, and were manifestly placed at a disadvantage and in a prejudicial light before the jury in their inability to repel such insinuations thus brought into the case under the guise of the right of cross examination. It was enough to require defendants to meet the incriminating circumstances in the case itself without imputing and characterizing as such those connected with another and irrelevant transaction.

That it is error to admit proof of another distinct offense from that for which a defendant is put on trial, except in a certain class of cases where a guilty intent must be shown to meet the presumption of accident or mistake (Marshall v. U. S., 197 Fed. 511), is conceded, and where such proof is admissible under the exception it must be clear and convincing. Evidence of a vague and uncertain character regarding such an alleged

offense is never admissible. (Gart v. U. S., 294 Fed. 66; Paris v. U. S., 260 Fed. 529.) While the evidence thus brought out on cross examination did not prove another distinct offense, it was just as erroneous and dangerous, that being the purpose of it, as if it did. In fact while it was consistent with honesty and innocence on the part of the Cartozians, the attempt was made to give it a different coloring. We cannot say that the proof of guilt of the offense charged was so clear as to render such errors not reversible.

The only attempt to justify in this court the admission of such evidence is on the ground that it was proper cross examination, it being argued that the prior robbery was brought out by defendants to impress the jury that the claim for insurance for loss in the former burglary was made and accepted in good faith. There is nothing whatever in the record that reasonably tends to disclose any such purpose.

As further justification of the examination it is argued that because Barton ran down to the police station to report the August burglary instead of telephoning, the prosecutor had a right to find out "how he conducted himself at the time of the former burglary," and also that because it was claimed that defendants were ignorant and inexperienced, the state had the right to show that they had experience in getting insurance for the February burglary. Not only is the reasoning most specious, but the cross examination was not conducted on any such lines. Its sole purpose was clearly to drag in an extraneous affair and give it the coloring of criminality in order to convince the jury that defendants must thereforebe guilty of the charge on which they were being tried. That counsel succeeded in doing so may well be inferred from the fact that the jury gave the elder Cartozian the extreme

penalty of the law. When this may result from evidence of a prejudicial character a judgment may be reversed on that ground alone. (People v. Heffernan, 312 Ill. 71; People v. Meisner, 311 Ill. 49.) But regardless of that feature of the case, the admission of such evidence on cross examination and the prejudicial comment upon it call for a reversal of the judgment and remandment of the case.

We need not dwell further upon the manifest impropriety of the prosecutor's cross examination and remarks. He was confessedly "young, green, and new at the game." But that does not palliate the consequences of error, nor excuse incompetency in presenting the rights of the People. Criticism of courts of review for reversing verdicts of juries lose much of their force on revelation of a course like this to procure a conviction. It is the boast of our Anglo-Saxon jurisprudence that the accused will be accorded a fair trial. One was not had in this case. We may appropriately add what was recently said by our Supreme Court in reversing a criminal conviction in People v. Trimm, 323 Ill. 530:

> "It can subserve no good purpose to secure a record number of convictions if, in order to secure the same, error must be committed and well recognized rules of law violated, necessitating reversal by a court of review. Prosecutors and judges who desire not only that criminals should be convicted but also punished for their crimes should carefully guard against error instead of injecting reversible error into the record." (536.)

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

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243 I.A. 633

DAVID FLYER,
Defendant in Error,

vs.

NATHAN ZIMMERMAN and
OSCAR ZIMMERMAN,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

It appears from the record that the action below was brought to recover for an assault, to which defendants pleaded the general issue, and a special plea setting up self-defense. Afterwards the cause was continued for several terms on plaintiff's motion, and later on his motion, an order defaulting defendants for want of appearance was entered in disregard of said pleas, and the cause referred to a jury to assess plaintiff's damages. This was error. (Hine Bros. V. Adams, 139 Ill. App. 92.) Evidently the court was not advised of the state of the record. Whether the defendants were present or not, they not being in default, it was necessary to have the issues as well as the question of damages submitted to the jury. (id.)

Nor were the issues made up by replication to the special plea. Without it it would have been error to go to trial, unless it were in some way waived. (Blake v. Miller, 118 501; French v. Scobey, 108 Ill. App. 606.)

We cannot agree, however, with the contention that the declaration does not state a cause of action because of its informality in the superfluous use of the word "whereas." Defendants took issue on the pleading and waived that informality.

DAVIS ATLAS,
Intervenor in Error,

-vs-

NATHAN SIMPSON & ano
ORDEN KIRKPATRICK,
Plaintiffs in Error.

2431.A. 633

TRANS IN ERROR FROM

CASE COUNTY.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

It appears from the record that the action below was brought to recover for an account, to which defendants pleaded the general issue, and a special plea setting up self-defense. Afterwards the cause was continued for several terms on plaintiff's motion, and later on his motion, an order defaulting defendants for want of appearance was entered in discharge of said plea, and the cause referred to a jury to assess plaintiff's damages. This was error. (Ellis Bros. V. Adams, 132 Ill. App. 62.) Evidently the court was not advised of the state of the record. Whether the defendants were present or not, they not being in default, it was necessary to have the issues so well as the evidence of damages submitted to the jury. (Id.)

The very the issues made up by replication to the special plea. Without it it would have been error to go trial, unless it were in cases not material. (Ehrich v. Ehrich, 118 Ill. Pomeroy v. Cooper, 108 Ill. App. 606.)

No counsel appear, however, with the contention that the declaration does not state a cause of action because of the insufficiency in the supernluous use of the word "whereas." Defendants took issue on the pleading and waived that insufficiency.

The action is one in tort and it is no objection that it was brought against more than one defendant. Either one or both might be found guilty in such an action.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

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243 I.A. 633

CHARLES ALLEN,
Defendant in Error,

v.

EDWIN L. COYLE, L. M. LEWIS,
and E. S. TRUE,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendant in error filed his statement of claim in the Municipal Court of Chicago against plaintiffs in error, alleging that the claim is upon a certain acceptance, in words and figures as follows:

"$2,000. Chicago, May 20, 1925.

EDWIN L. COYLE
Investments

Thirty days after date pay to the order of L. M. Lewis Two Thousand and no/100 Dollars.
Value received and charge same to account of Edwin L. Coyle.
(Sig.) George Lawson,
Secretary.

First National Bank,
Ackley, Iowa."

The statement alleged that there was written vertically across the face of the instrument the words: "Accepted May 20, 1925. Edwin L. Coyle."

It is then alleged "that said acceptance was duly indorsed by said defendants, L. M. Lewis and E. S. True," and that there is now "due on said acceptance" $2,000 and interest.

Each of the defendants filed his affidavit of merits in substantially the same form, alleging that he did not receive notice of dishonor or non-payment of the said supposed acceptance and, therefore, was discharged from any liability thereon;

2431A. C33

that he was not indebted to plaintiff in any amount whatsoever by reason of the matters so set forth.

At the close of plaintiff's evidence both sides rested, and each party for himself moved for a directed verdict in his favor. The court overruled the motion of defendants and granted plaintiff's motion for a directed verdict for $2,083.33.

Motions for a new trial and in arrest having been overruled, judgment was entered on the verdict and is here for review.

Plaintiff's evidence consisted merely of the facts that he received the paper from defendant True, for a consideration, and took it to the Madison-Kedzie State Bank for collection about ten days before its maturity, "on account of its being such a distance" (evidently referring to Ackley, Iowa); that about ten days after its maturity he was notified by said bank that it remained unpaid; that it was then returned to him; that about two days thereafter he saw True and told him the bank had returned "the note, the acceptance," on account of not sufficient funds, and showed it to him; that True suggested he should see Coyle; that Coyle was seen and told him that he believed he would be able to get the money for him if he would wait thirty or sixty days; that he waited for that time and then came back to True who suggested that he sue, that there was no use in waiting any longer; that he then went to Lewis who said "we expect a big deal to go through, and as soon as it does I will get your money," that the paper was "all right" and he would get his money, but should be reasonable and wait sixty days; that plaintiff then took the note back to his office and decided to sue.

The instrument was then introduced in evidence, worded as in the statement of claim, except that it purported to be

that he was not indebted to plaintiff in any amount whatsoever.

At the close of plaintiff's evidence both sides rested, and each party for himself moved for a directed verdict in his favor. The court overruled the motion of defendants and granted plaintiff's motion for a directed verdict for $1,000.32.

Motions for a new trial and in arrest having been overruled, judgment was entered on the verdict and is here for review.

Plaintiff's evidence consisted merely of the facts since he received the notes from defendant Tree, for a consideration, and took it in the Hutchison-Hanis State Bank for collection about ten days before its insolvency, "on account of its being such a time", (evidently referring to "okay," Jones') that shows the defendant (evidently referring to Okay, Jones') that shows the date after its maturity he was notified by said bank that it had refused payment; that it was then returned to him that about two days thereafter he saw Tree and told him the bank had returned "the note, the consequence," on account of not sufficient funds and showed it to him; that Tree suggested he should see Okay and that Okay was seen and told him that he believed he would be good for the money for him if he would wait thirty or sixty days; that he waited for that time and then came back in Tree spoke to Okay for the money for him if he would wait thirty or sixty days; that he waited for that time and then came back in Tree who suggested that he see, that there was no use in waiting any longer; that he then went to Davis who said "as soon's pay day is to thursday, and we soon as I will get them money," that the Davis was "all right" and he would get his money, but should be reasonable and wait along about that plaintiff then just the note back to him stating and declined to see.

The instrument was then introduced in evidence, stating

signed by George Lawther instead of George Lawson. The court erroneously overruled the point made as to such variance. It is clear that the statement of claim should have been amended after the point was made.

It is the theory of counsel for defendant in error that the bill of exchange is addressed to, and accepted by, Coyle, and he makes the untenable claim that it "reads as if signed by the bank, George Lawson, secretary." It clearly purports on its face to be a foreign bill of exchange drawn on said bank in Ackley, Iowa. Said bank, therefore, was the party to whom the bill should have been presented for acceptance. There was no proof that it was presented to it. On the contrary, it appears to have been presented to Coyle for acceptance. If he was not the drawee, then his acceptance "is merely voluntary, without any consideration, and creates no liability whatever in the law," for it is a well settled rule of commercial law "that no one but the person upon whom it is drawn can accept a bill, except for honor." (Ruling Case Law, Vol. 3, p. 1301, sec. 535.)

But the uncertainties of the instrument are such that it is impossible to say, without additional proof, who was the drawer. There was no evidence to show who George Lawson or Lawther was, or whether he was anybody's secretary. The word "secretary" might be deemed merely descriptio personae.

Without additional evidence, therefore, as to the relation of the parties to the instrument their liability could not be determined upon the evidence adduced. Without presentment for payment, protest and notice of dishonor, unless the same were waived, - and the evidence is insufficient to show waiver of all the parties at least - the court was unauthorized in

signed by George Washington instead of George Jameson. The name
erroneously overruled the point made on the most variance. It is
clear that the statements of clerks should have been accepted after
the point was made.

It is the theory of counsel for defendant to argue that
the fact of ownership is addressed to, and accepted by, Doyle,
and he makes the reasonable claim that it "reads as if signed by
the bank, George Jameson, secretary." It clearly purports on its
face to be a regular bill of exchange drawn on said bank in
validity, form. Said bank, therefore, was the party to whom the
bill should have been presented for acceptance. There was no
proof that it was presented to it. On the contrary, it appears
to have been presented to Doyle for acceptance. If he was not
the drawee, then his acceptance "is merely voluntary, without
any consideration, and creates no liability whatever in the law."
(It is a well settled rule of commercial law "that no one but
the person upon whom it is drawn can accept a bill, except for
honor." (Making Good Law, Vol. 3, p. 1903, sec. 882.)

And the circumstances of the instrument are such that
it is impossible to say, without parol, who was the
drawee." There was no evidence to show who George Jameson or
Lawlor was, or whether he was anybody's secretary. The word
"secretary" might be deemed merely descriptive
[illegible] evidence, therefore, as to the
relation of the parties to the instrument their liability could
not be determined upon the evidence adduced. Direct testimony
for payment, protest and notice of dishonor, unless the same
were waived, - and the evidence is insufficient to show waiver
of all the parties at least - the court was constrained in

directing a verdict, and plaintiffs in error would be discharged from liability under section 131 of the Negotiable Instrument Act, which provides:

> "Where a foreign bill appearing on its face to be such, is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such bill, which has not previously been dishonored by non-acceptance, is dishonored by non-payment, it must be duly protested for nonpayment. If it is not so protested, the drawer and indorsements are discharged."

Accordingly the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

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243 I.A. 633

GUSTAVE REIDL,
Plaintiff in Error,

v.

MACK-INTERNATIONAL MOTOR
TRUCK CORPORATION,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment under review was one "as in case of nonsuit" with costs against plaintiff, instead of one in bar as the nature of the case called for.

The suit was based on paragraph 28, chapter 95, Cahill's R. S. 1925, giving the owner of a mortgaged chattel, after a sale thereof under the mortgage, a right to sue for and recover one-third of its value from the mortgagee, or person making said sale as assignee of said mortgage, in case the mortgageefails within ten days after the sale to make out and deliver to the mortgagor "a statement showing the items of personal property sold, the names of each purchaser and the amount for which each article sold, and also an itemized statement of the necessary reasonable expenses incurred in taking, keeping and selling said property." The statute is penal in its character (Gridley v. Barnes, 103 Ill. 211; Vestal Co. v. Robertson, 277 Ill. 425-429,) and the right of action thereunder is barred by section 14 of the limitation act if not commenced within two years next after the cause of action accrued. (Cahill's Stats., supra, ch. 83, par. 15; Vestal Co. case, supra.)

2481.A. 633

Defiance Police,

Plaintiff in Error,

v.

Defendant in Error.

The judgment under review was one in favor of [illegible] with costs against plaintiff, instead of one in favor of the notary or the case called for.

The suit was based on Paragraph 38, Chapter 95, Chapin's R. S. 1908, giving the owner of a mortgaged chattel, after a sale thereof under the mortgage, a right to sue for and recover one-third of its value from the mortgagee, or person making said sale in exchange of said mortgage, in case the mortgagee fails within ten days after the sale to make and deliver to the mortgagor a statement showing the time of January payment, the names of each purchaser and the amount for which each article sold, and also an itemized statement of the moneys realized from the sale of the property. The statute is penal in its character (Miller v. Brown, 249 Ill. 211; Tetzel v. [illegible], 227 Ill. 418-424,) and the right of action thereunder is barred by section 14 of the limitations act if not commenced within one year after the cause of action accrued. (Chapin's Stats., Hurd's, ed. 21, par. 181 Tetzel v. [illegible], Supra.)

The basis of the action was a failure to set forth in the statement required and made, "the necessary reasonable expenses incurred in taking, keeping and selling said property."

In its affidavit of merits defendant pleaded that no such expenses were incurred or charged, also the two years' statute of limitation, and that the act was unconstitutional.

The judgment order recites that the court found the issues against the plaintiff "on the pleadings", and ordered that defendant have judgment as in case of nonsuit. The order also recites that the court heard evidence.

Upon such a record a judgment of nonsuit was improper. On such pleadings there could be only a judgment in bar, and none at all could be entered on the pleadings in that state unless authorized by some rule of the municipal court. Its rules are not before us. Had the order been based on the evidence heard we would, in the absence of a bill of exceptions, reverse and enter here a judgment in bar on the presumption that the evidence warranted it. But the judgment being based on pleadings we cannot, in the absence of any rules of that court in the record to show whether such a judgment could be entered under them, know the theory on which it was entered, nor enter any other judgment here than one of reversal and remanding the cause.

Inasmuch as the statement of claim shows on its face that the statute had run, defendant might have availed itself of the point by demurrer (Lesher v. U. S. Fidelity Co., 239 Ill. 502), or by what answers thereto under the Municipal court practice. But a demurrer would be deemed waived by pleading over as was done in this case. (Puterbaugh's Common Law Pleading and Practice, sec. 104.) Then, under the general principles of practice, where defendant pleads the statute,

plaintiff, in order to avail himself of any fact that would take the case out of its operation, must set the fact up in a replication. (id. sec. 170.) Whether the rules of the Municipal Court are at variance with these general principles we cannot know without their being in the record.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

1 - 30297

243 I.A. 633

H. L. YUNG,
Defendant in Error,

v.

FRANCES RIEMANN and
ERNEST SAUNDERS,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This was an action for the contract price of carpenter work alleged to have been done under a contract with defendants. The evidence shows that plaintiff did certain carpenter work on a building belonging to the defendant Frances Riemann, and that the defendant Saunders acted as her agent in that matter. It is true that he paid part of the bills, but he charged the same to the account of Mrs. Riemann. Each of the defendants filed an affidavit of merits denying any joint liability. In the absence of any evidence whatever of such joint liability, the judgment against both defendants is clearly erroneous. For that reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

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WILLIAM J. CLEARY, doing business as WILLIAM J. CLEARY & CO.,
Appellee,

v.

C. B. LAIDLAW and EARL L. GEBOTT, copartners doing business as CHICAGO CREAM FRIED CAKE COMPANY, Plant No. 1,
Appellants.

243 I.A. 634

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in plaintiff's favor for the amount claimed to be due for work done as a stenographer, money expended in connection therewith, and interest. Defendants do not deny that plaintiff did the work, nor dispute the amount of his bill, but they deny that they ever ordered the work done or agreed to pay for it.

It appears that Edward J. Sweeney and Miles Gebott had secured contracts and options on a number of bakeries which they attempted to merge into one large Illinois corporation, under the name of Gebott Baking Corporation. The projected new corporation was to be capitalized at over a million dollars and a plant in Chicago owned by the defendants C. B. Laidlaw and Earl L. Gebott, partners doing business as Chicago Cream Fried Cake Company, Plant No. 1, was to be taken over at a valuation of $300,000. Sweeney and Miles Gebott employed Jay J. McCarthy, a lawyer, to prepare certain papers, documents and affidavits necessary to qualify the stock of the corporation for sale under the Securities Act of this state. McCarthy called on the plaintiff to do this work. After plaintiff had taken several hours dictation, he inquired of

Appliance.

7.

Claim No. 1.
Claiming driving buttons as
C. E. Talley and Leon L. Scott.

Appliance.

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McCarthy who was to pay for it. McCarthy testified that he replied that he would assume no personal responsibility, that he never saw or heard of Sweeney or Miles Gebott until they came to his office, and that he gave plaintiff "a list of the baking concerns in different parts of the country that they said they owned or had options on." He testified that he did not know Earl Gebott and that the defendant Laidlaw "never asked me to represent him individually in any matter." The plaintiff testified that he refused to go on until he could be assured, by appellants, that they would pay for it, that he was thereupon introduced by McCarthy to Laidlaw, who told him to "write a letter embodying our understanding," which he did, and two days later, Earl Gebott came to his office and said they got his letter and knew what his charge would be, that when the work was completed, he was to send a bill and they would send a check. This is flatly denied by the defendants, and there are many facts and circumstances in the record which support their denial.

When the suit was begun, McCarthy and Sweeney were joined as defendants with appellants. Plaintiff's verified statement of claim alleges that the sum of $1722.94 is due from all of them "for stenographic services furnished to the said defendants and each of them, at their special instance and request, in and about the making of certain documents, seeking qualification of an issue of securities of the Gebott Baking Corporation, an Illinois corporation," etc. Later, the suit was dismissed as to McCarthy and Sweeney. The statement of claim was not changed or amended.

Appellants' appearance and their separate affidavits of merits were filed by an attorney named Goldberg. Five days before the trial began, an order was entered that leave be granted to Goldberg "to withdraw as attorney for C. B. Laidlaw and Earl L.

Gebott, and Charles J. Trainor be substituted * * * as attorney of record for C. B. Laidlaw." This left Earl Gebott without any attorney of record to represent him.

This was the situation when the trial of the case was begun before a jury, the defendant Laidlaw being the only one of appellants present or represented by counsel. After the testimony had been taken and arguments made, Thomas H. Reilly, an attorney, appeared and said he represented the defendant Earl Gebott, who was not aware the case was to be tried at that time. Upon Reilly's representations, he was permitted to enter his appearance, and a verbal stipulation was made in court to the effect that a juror should be withdrawn and the case continued fifteen days and then submitted to the court without a jury upon the evidence already heard and the evidence of Earl Gebott, which should be the only further evidence to be heard. At the appointed time the parties again appeared and the evidence of Earl Gebott was heard.

Counsel for the defendants then asked leave to further cross-examine the witness McCarthy for the purpose of showing additional facts and circumstances which had come to their knowledge after McCarthy had testified. They offered to prove by McCarthy that an itemized bill which plaintiff had sent to Miles Gebott and Sweeney for the same work had been referred by Sweeney to McCarthy, who had written a letter advising Sweeney about it. The itemized bill and McCarthy's letter were produced, offered in evidence, and are shown in the bill of exceptions. The court refused to permit further examination or cross-examination of McCarthy and refused to admit or consider the offered evidence. In this we think the court erred. As we read the offered testimony, it was certainly material and important, and, if unexplained, might be decisive, in view of the conflict in the evidence. The authorities cited by

plaintiff's counsel to the effect that it is discretionary to admit or refuse to admit further testimony after a case is closed, and that such discretion is not reviewable, usually qualify that statement by adding: "unless some injury is occasioned to the party complaining," or "unless such discretion is abused," or equivalent language. (I. C. & W. Ry. Co. v. Hendrian, 190 Ill. 501, 503; City of Sandwich v. Dolan, 141 Ill. 430, 441; Anderson Transfer Co. v. Fuller, 174 Ill. 221, 227.) The facts of this case call for the application of the exception, rather than the general rule.

For the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

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WILLIAM F. BARTZ,
Plaintiff in Error,

v.

BALDWIN PIANO COMPANY, a corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE PITCH DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment for the defendant entered upon the verdict of a jury. The action was in trespass. The evidence on behalf of the plaintiff tends to prove that a deputy bailiff of the Municipal court went to plaintiff's residence with a replevin writ for a piano; that an agent of defendant, named Roche, accompanied the bailiff; that the plaintiff declined to admit them and threatened them with personal violence if they broke in; that while they were talking one of the front windows was broken and the bailiff then lifted the window, opened the door and admitted the piano movers, who took away the piano, causing some damage to the floor, carpet and curtains. The plaintiff himself is the only witness who states positively that Roche broke the window. The evidence for the defendant tends to prove that the window was broken by the bailiff or by accident, and that little, if any, damage was done in removing the piano. There is also evidence that the replevin suit resulted in a finding and judgment that the piano company was entitled to the possession of the piano.

Four alleged errors are assigned, but only one is argued. It is contended that defendant had no right to forcibly enter the home of the plaintiff to get possession of a piano, and that in so doing "plaintiff's constitutional rights were outraged and

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violated," and that because thereof plaintiff was entitled to a new trial "as the verdict is against the manifest weight of the evidence."

We have read the abstract of the evidence and find little support in it for this contention. The evidence was conflicting upon the question whether defendant "forcibly entered," and it was peculiarly the province of the jury to decide that question. The only representative of the defendant who was present at the time of the alleged trespass was the witness Roche. There is no testimony that he entered plaintiff's home, and he flatly denied that he broke the plaintiff's window as claimed by the latter. If the jury believed the testimony of Roche the verdict naturally followed.

We find no reversible error in the record, and the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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243 I.A. 634

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN NOLAN,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review the conviction of the defendant in the Criminal court upon a charge of assault with a deadly weapon with intent to inflict a bodily injury.

There were four witnesses for the prosecution and none for the defense. James Cunningham testified that he was a tuck-pointer by occupation and was formerly a partner of the defendant; that on October 3, 1925, he went to defendant's garage, on Normal avenue, Chicago, and asked defendant for some of the equipment that had belonged to the partnership and for money he claimed was due from defendant; that defendant's reply was to strike him in the face and to tell a big man named Soly, who was present, to put him out; that Soly struck him and put him out; that defendant "disappeared for about one minute and, as far as I can remember, walked right back and took out a revolver and shot me." On cross-examination he said that before the shooting, he had been in a poolroom and had drank "maybe a couple of bottles of beer," but did not get it in the poolroom; that when the fight began and defendant struck him, he "naturally" struck back, but did not have anything in his hand.

Isidore Rumszikas, a cab driver, testified that before the shooting he drove Cunningham and a man named Farrell to a

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IN THE CIRCUIT COURT
OF COOK COUNTY.

poolroom, where they stayed about ten minutes, and then drove on to Nolan's garage; that he "smelled a little booze on Farrell and Cunningham;" that both went into the garage and remained there about ten minutes, when Farrell came running out with a hammer in his hand, that he also saw Cunningham hit Nolan over the left shoulder with a board a yard and a half long and six inches wide, whereupon Nolan "pulled out his gun" and shot Cunningham; that when the shot was fired, the defendant was standing six feet inside the open door of the garage and Cunningham about two feet outside.

Farrell testified that he did not go into the garage; that he never had a hammer in his hand; that he heard one shot and did not see who fired it, but while standing in front of the door, he "seen a hammer come flying towards me," and that he had it in his hand "for a minute to drop it again." He also testified that he first met Cunningham in a barber shop, from which they went together to a poolroom, but neither of them had anything to drink until after the shooting.

The fourth witness was a police officer, who merely testified that when he saw Cunningham in bed at the hospital after the affray was over "you could smell liquor."

During the argument, the assistant state's attorney made this remark: "The defendant, though he has not taken the stand, undoubtedly relies upon self defense." This was objected to and exception taken. The statute forbids any reference to the failure of a defendant to testify in his own behalf in a criminal case, and in The People v. Annis, 261 Ill. 157, the court said regarding a similar remark made by an assistant state's attorney that "we do not recall any case where remarks of the character here made were not held to be reversible error." The state's attorney relies

upon the decision in the later case of The People v. Young, 316 Ill. 508, in which a somewhat similar remark, provoked by the argument of counsel for the defense, was held insufficient, of itself, to reverse. But in that case the court said: "If the case made against defendants were not so overwhelmingly clear and conclusive we might be disposed to reverse the judgment for that error, but the evidence makes it conclusive that the jury could not reasonably have found any other verdict than one of guilty, if the assistant state's attorney had made no reference to the defendants' failure to testify." We think this cannot be said of the evidence in this case. The only apparently disinterested witness to the occurrence was the cab driver, and if his testimony is to be believed, the verdict might well have been for the defendant. He was called by the People and there is nothing unreasonable or improbable in his testimony, which differs materially from that of Cunningham and Farrell. We are unable to say that the guilt of the defendant was proved so clearly and conclusively that the manifest error of the state's attorney was not prejudicial and for that reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois;

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 - 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Rehg. denied Jan. 10-1927

Mary E. Elias,
Appellee,

vs.

Edward Baker,
Appellant.

243 I.A. 634

Appeal from the Circuit Court of LaSalle County.

Partlow, P. J.

Appellee, Mary E. Elias, recovered a judgment for $5000 in the circuit court of LaSalle county against appellant, Edward Baker, on account of an assault, and an appeal has been prosecuted to this court.

The evidence shows that appellee was 28 years old, weighed about 200 pounds, and for 12 or 15 years had been employed by L. M. Harvey, proprietor of the Clifton Hotel, in Ottawa, Illinois. Appellant was 54 years old, weighed about 170 pounds, and was the president of a wholesale grocery company in Streator, Illinois, which is about sixteen miles south of Ottawa and connected with it by a concrete road. They had kept company for about two years prior to July 27, 1924. When they began going together, appellant was a married man, but living separate and apart from his wife, and a divorce proceeding was pending. Appellee testified that when they began going together she thought the divorce had been granted and when she learned that it had not been granted she stopped going with him for about three months until the decree was granted, which was on July 11, 1923. During these two years appellant gave appellee various sums of money ranging from $20.00 to $100.00, and amounting in all to $350.00 or $400.00, which she used for her personal needs.

Appellant testified that in December, 1923, they became engaged to be married, and the wedding was to be in September, 1924. She testified that he proposed marriage and talked about it every time

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Appeal from the Circuit Court of LaSalle County.

they were together; that he fixed upon September or October, 1924, as the time for their marriage; that she refused at first to marry him, but towards the last, did not say she would and did not say she would not. Appellant learned that appellee was going out nights with a man by the name of Johnson and that she had gone to Green Rock Inn, alleged to be a notorious resort. Appellant testified that he frequently remonstrated with her about this and she assured him she would observe his wishes in the matter.

Appellant had an appointment to take appellee out riding Saturday evening, July 26, 1924. She later cancelled the engagement. An appointment was made for Sunday, July 27, 1924. Appellant went to the Clifton Hotel in Ottawa about three o'clock P. M. that day in a Nash sedan. They started for Streator on the concrete road. On the way they began quarreling. He asked her to meet him that night and she refused. He accused her of having broken the engagement the night before in order to go out with Johnson and charged her with having an engagement with Johnson for that evening. He testified she called him names and struck him repeatedly. About one mile north of Streator appellant left the concrete highway, drove east for about 2½ miles, then went south a short distance and stopped where there were no houses. Appellee asked him why he went off of the paved road and he replied that the road was better that way and they would get to their destination just the same. After the car stopped, appellant asked appellee whether she was going out with him that night. She replied that she was not. She testified that appellant then said: "If you are not going ~~out~~ with me you will not go with any one else"; that he took a revolver from a pocket of the car, pointed it at appellee, repeated that if she did not go out with him she would not go with any one else and that he would kill her there. She testified she begged him not to kill her and he struck her several times in the face and eyes with his fist; that he had a pair of long barber

shears and began cutting her hair; that she struggled to open the door and attempted to get out but failed. She testified he struck her on the left temple with the gun, and with a cord such as is used in tying packages tied her right arm to the door of the car and pushed her left arm between him and the seat and leaned on it so she could not move; that her eyes were swollen shut for several days. He finished cutting her hair and she testified that he was uncertain whether he would take her to her sister, or back to the hotel, or kill her. She testified she begged him not to kill her but to take her to her sister. This he started to do and drove toward Streator. She testified he went only a short way when he stopped the car, fired the revolver out of the window, and said that the bullet should have been for her. He then went to the home of her sister where she got out of the car and went in the house followed by appellant. There were blood stains upon his shirt. The sister testified he told her he had acted this way because appellee would not go out with him, he had fixed her so she could not go out at all, and that this was her reward for her untruthfulness. The husband of appellee's sister testified that appellant said he had a gun. Appellant remained in the house about 15 minutes and then drove away.

The evidence tends to show that appellee's face and nose were badly bruised and swollen. Her eyes were black for two or three inches underneath. The whites of her eyes showed hemorrhages and were bloodshot. There were some abrasions about her eyes and nose. Her hair was cut off irregularly and fairly close, about one inch long. She was in a highly nervous state. The discolorations of her face and eyes existed for several days.

On the fourth day after the assault she filed a complaint in the county court charging appellant with insanity, thereupon the court appointed a physician to make an examination and he reported that appellant was sane and the proceedings were dismissed. On the third day after the assault, Dr. Clune was called to the state's attorney's

office and saw appellee for about five minutes and he later testified to the condition she was in. On the same day she had her photograph taken. There is evidence tending to show that this photograph was taken upon a plate which was not retouched, and did not show the discolorations of her face. She testified that she had been obliged to have medical treatment on account of her injuries and that Dr. Clune gave the treatment. Dr. Clune testified that she did not require medical attention and that he did not treat her.

Appellant testified that they got into an argument and she started to open the door and get out; that he threw his arms around her shoulder and she began hitting him in the face and they had a scuffle; that he had accused her of a lot of things and she admitted them. He was very much excited and cut off the front lock and the little ones she had over her ears; that he did not cut off her hair as it appeared in the photograph and did not have a revolver; that the scissors were the ones he used in his business and always carried, that they were not in the pocket of the car, that there was no pocket in the left hand door; that he had no rope and did not tie her hands; that when they went into the house at Streator her hair, except for those three locks, was not cut off, and her eyes were not swollen shut; that for thirteen years he had spells of unconsciousness, some called it epilepsy; that he had been treated by many doctors; that in the first two years he had an attack every week, sometimes they lasted a minute and sometimes fifteen minutes. After the first two or three years they would come on from three to five minutes apart for a number of years; that he had not had an attack for nine months prior to July 27, 1924. On cross-examination he testified that his recollection was not clear of anything that took place after the car stopped; that he did not have the conversations testified to by appellee's sister and her husband; that he did not know whether he had an attack of epilepsy or not; that he thought he was in a state of

coma; that he had previously been in a state of coma and traveled around without knowing what he was doing.

Appellant urges that on cross-examination counsel for appellee made reference to the terrible beating which they claimed their client received with the revolver, and in order to give color to appellee's claim that appellant used a revolver, it is claimed by appellant that they persistently, contrary to the ruling of the court, attempted by questions to give the jury the impression that appellant habitually carried a revolver, that he had repeatedly been found with one on his person, and that a gun had been taken away from him since the assault. Objections were sustained to all the questions which were asked along this line, but appellant insists that the action of counsel for appellee constitutes reversible error.

In the first instance appellee testified that appellant had a revolver; that he told her he was going to kill her; that he struck her with the revolver; that later he fired the revolver out of the window of the car and said that the bullet should have been for her. The brother in law of appellee testified that appellant told him he had a revolver. In his examination in chief appellant testified that he did not have a revolver and that there was no pocket in the left hand door of the car from which a revolver could have been taken; that he did not strike appellee with the revolver and did not fire it out of the window. Under these circumstances appellee had a right to reasonably cross-examine appellant with reference to whether he did or did not have a revolver. It may be that some of the questions asked were not proper and that objection was properly sustained, but we do not think this cross-examination was such as would justify a reversal of the judgment.

Appellant claims that counsel for appellee made improper and offensive remarks to the jury; that he repeatedly referred to the alleged improper conduct of the parties and to the virtue of appellee; that he said: "When any girl can go out with Ed Baker for two years

and still be virtuous she is a good girl," implying that appellant had attempted to violate the chastity of appellee, and that the alleged assault was a vicious and beastly one to bring about her downfall. Also that counsel referred to the fact that Mrs. Harvey, the wife of the proprietor of the Clifton Hotel, was in the court room in appellee's behalf. The entire argument does not appear in the record. Only a few remarks are set forth about which complaint is made, It is apparent from a reading of this record that the improper remarks during the trial, and on the argument, were not all on one side, that they were provoked by statements that were made by counsel on each side. It is impossible for us, in considering a few isolated sentences in an argument, with no information as to its context, or the line of argument of which it formed a part, or as to what had already been said by the same counsel, or by counsel on the other side, to determine whether, all things considered, it may not have been justified, or to what extent it may have been prejudicial to the defendant. Lake Erie & Western Railroad Co. vs. Middleton, 142 Ill. 550 ; Walsh vs. Chicago Railway Co., 303 Ill. 339; Aetitis vs. Spring Valley Coal Co., 150 Ill. App. 497; Rost vs. Noble & Co., 232 Ill. App. 435. In each instance the court sustained the objection and we do not feel that the judgment should be reversed on the grounds complained of.

On his motion for a new trial, appellant filed an affidavit in which he alleged that frequently during the closing argument of counsel for appellee, the crowd in the court room laughed and gave visible evidence of their approval of statements made; that the attitude of the crowd was partisan, boisterous, and several times repeated, until the trial judge threatened to clear the court room. We have carefully examined the abstract for the evidence of these facts. We only find one occasion where it appears that there was any demonstration from those in the court room. The record shows that

counsel said that $400.00 or $500.00 from appellant in the space of two years would not be any more to appellant than a box of candy to a boy out in the country. An objection was sustained to this remark. He then said that appellee had worked at the Clifton Hotel for thirteen or fourteen years and Mrs. Harvey was there in her behalf. Objection was sustained to this and counsel for appellant said: "Why was she taking this money." Counsel for appellee replied "it is just like taking four boxes of candy from a boy," and the record shows that there was laughter in the court room, The court immediately called the audience to order and informed them that if they did not preserve order he would clear the court room. We do not think this was sufficient to constitute reversible error.

At the close of the evidence for appellant, a motion was made to exclude all of the evidence as to the present physical condition of appellee, including her testimony as to headaches since the assault. It is insisted that this motion should have been allowed for the reason that there is nothing in the record to show that the headaches were in any way due to the alleged assault, but that the contrary was shown by the testimony of appellee's witnesses. Appellee testified that prior to the assault she had never been troubled with headaches and that since the assault she had been troubled with headaches almost continuously. There was no error in the admission of this evidence. It was a fact to be taken into consideration by the jury in determining the extent if any to which appellee had suffered by reason of the assault made upon her.

The second and third instructions on behalf of appellee were as to the measure of damages, both actual and punitive. ~~Both instructions on behalf of appellee were as to the measure of damages, both actual and punitive.~~ Both instructions announce correct rules of law, but it is insisted by appellant that they ignore the possible unsoundness of mind or insanity of appellant. It is urged that there

s sufficient evidence on this point to entitle appellant to have is question submitted to the jury. It is conceded that an insane rson is liable civilly for actual damages for his torts. An in- ne person is not liable for punitive damages. McIntyre vs. Sholty, 1 Ill. 660. The eighth instruction given on behalf of appellant rrectly announced this rule of law. The ninth and tenth instruc- ons given on behalf of appellant are with reference to punitive mages, and neither makes any reference to the possible insanity of ppellant. If the second and third instructions on behalf of appel- ee were incorrect in this respect, then the eighth and ninth on ehalf of appellant were also incorrect. Appellant will not be eard to complain of an error in an instruction on behalf of appellee, nen the same error was embodied in instructions given on his behalf. he instructions are to be considered as a series. When they are consi idered as a whole they expressly tell the jury that if appellant was emporarily insane at the time of the assault.that he was incapable f entertaining any malicious intent against appellee and the jury ould not be warranted in giving punitive damages but would be confined olely to compensatory damages. There was no reversible error in the iving of the second and third instructions.

It is urged that the verdict is excessive. If the evidence on ehalf of appellee is to be believed, the assault was unjustified and anton. The amount of damages is so largely in the judgment of the ury that it is only in extreme cases that the court is justified in nterfering with its finding. Lowry vs. Orr, 1 Gil. 83; Scott vs. Hamilton, 71 Ill. 85; Netcher vs. Bernstein, 110 Ill. App. 484. In McNamara vs. King, 7 Ill. 437, it was held with reference to verdicts of juries "that courts will not disturb their verdict on the ground that the damages are excessive, unless it is manifest that they have been governed by passion, partiality or corruption; and to draw such a conclusion, it is not enough that the damages, in the opinion of the court, are too high, or that a less amount would have been sufficient

tisfaction for the injury. It must be apparent at first blush that
damages are glaringly excessive." To the same effect is Lake
reet Elevated Railroad vs. Collins, 118 Ill. App. 272. We would not
justified in reversing the judgment on account of the amount of the
rdict.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 635

BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 - 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

ohn A. Dahlin,
Appellant,
vs.
he Maytag Company, a Corporation,
Appellee.

Appeal from the Circuit Court of Winnebago County.

243 I.A. 635

attlow, P. J.

Appellant, John A. Dahlin, began an action of trespass on the ase in the circuit court of Winnebago county, against appellee, The Maytag Company, a corporation, for damages for breach of a written ontract. Judgment by default was entered against appellee, a writ f error was prosecuted from this court and the judgment was reversed. 38 Ill. App. 85. Upon the case being redocketed in the trial court, ppellee filed pleas, there was a trial by jury, verdict and judgment gainst appellee for $843.75, and an appeal has been prosecuted to this ourt.

In our former opinion we set out the contract and the alleged reach, therefore it will not be necessary to restate those facts. In addition thereto the evidence shows that sometime in November, 1923, representatives of appellee went to Rockford and had a conference with appellant relative to the cancellation of the contract of January 19, 1923. They told appellant that if he would cancel the contract, that appellee would open in the city of Rockford a store through which the machines would be sold; that appellee, through the store, would furnish to appellant the machines at $115 each to fill all orders which appellant then had unfilled and all orders which he secured before January 1, 1924; that during that time appellant would have the right to take orders for machines in Rockford and vicinity, and the store of appellee would have the right to sell machines

October Term, 1915.

Appeal from the Circuit Court of Winnebago County.

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the same territory; that appellee would pay appellant $35.00 for ch machine sold through the store during December, 1923; that on nuary 1, 1924, the city of Rockford and vicinity would be divided to eight sections and one or more sections assigned to appellant long as he would canvass the same and sell the machines therein; at appellee, through the store, would furnish the machinas to ll the orders and would pay appellant a commission of $35.00 on ch sale made in the territory so assigned to him, and $35.00 for ch machine sold through said store in the territory assigned to pellant; that appellee would advertise the machines and would liver and take care of the service on all machines thereafter sold. out December 1, 1923, the store was established in the city of Rock-rd. No more machines were shipped to appellant, but they were shipped appellee, and all machines were furnished to appellant as he re-ested them. He purchased twenty-one machines which were to be paid r in cash. He failed to pay for five of them and they were returned appellee. Appellant, however, sold only sixteen machines.

We think the preponderance of the evidence shows that the origin-l contract was cancelled and that the new contract was entered into. n behalf of appellee, two of its agents, who had had the talk with ppellant, testified to the cancellation. Appellant denied it, but a itness whom he called, in effect, sustained the contention of appellee. he conduct of appellant after December 1, 1923, and his mode of dealing ith appellee after that time shows a cancellation. Appellant contends hat he was entitled to prospective profits upon the seventy-five achines which were ~~did not~~ not delivered under the original contract, nd error is assigned on the first given instruction on behalf of appel-ee which limited the damages to a so called bonus of $3.75 each on 225 achines which were sold under the original contract. If the original ontract was cancelled as we have held, then appellant was not entitled o prospective profits under that original contract, but was limited to

damages as stated in the first instruction.

It seems to be conceded that appellant was entitled to recover judgment for $843.75 as rendered by the trial court. Under the idence he was not entitled to any additional damages and the judgment ll be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 635

BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 - 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

nna F. Whitehurst,
Appellee,

vs.

heatres Operating Company,
Appellant.

Appeal from the Circuit Court
Of Peoria County.

243 I.A. 635

artlow, P. J.

Appellee, Anna F. Whitehurst, recovered a judgment for 5000 in the circuit court of Peoria county against appellant, heatres opperating Company, for personal injuries, and an appeal as been prosecuted to this court.

As grounds for reversal it is urged that the evidence does ot show that appellee was in the exercise of due care and caution or her own safety, or that appellant was guilty of the negligence harged in the declaration. The evidence shows that appellee and er husband lived in Springfield, Illinois. On November 11, 1924, which was Armistice Day, they drove their automobile from Springfield o Peoria, arriving about nine o'clock A. M. Apprllee testified that when they left Springfield the sun was shining, but before they reached Peoria, it began to rain and that it rained, at intervals, during the entire day until after the injury in question. There is a conflict in the evidence as to the extent of the rain and how frequently it rained. The records of the weather bureau were offered to establish the condition of the weather. It is apparent, however, that it rained enough to make the sidewalks quite wet.

Just before six o'clock, appellee and her husband went to a restaurant, where they had their suppers. She testified they came out of the restaurant a little after six o'clock and it was raining and she had no rubbers or umbrella. They immediately went to the Princess Theatre on the west side of Adams street. The ticket office was at the front of the building and on the north and south of it

Appeal from the Circuit Court
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ere swinging doors into the lobby. They purchased two tickets nd went through the north swinging door into the lobby, which was bout 25 feet long east and west. At the west end of the lobby xtending the entire width of the lobby north and south, were 7 arble steps each about 12 inches wide which led up to a platform or anding upon which was located the door which led into the theatre roper. This landing or platform sloped about half an inch from he door to the top step leading down into the lobby. The lobby was ighted by four 75 watt bulbs and there was one light suspended about en feet above the steps. A brass rail extended east and west through he center of the lobby and up the steps at the west end, but it does ot appear just how far west it extended or how it was fastened. here was also a rail up the step on the north wall and a similar rail on the south side of the lobby. Persons entering the show went in on the north side between the brass rail and the north wall where the ticket taker was located, and those leaving the theatre went out through the south half of the lobby between the brass rail and the south wall.

Appellee and her husband went up these steps and entered the theatre, which was a moving picture show, the room being dark. They remained an hour and a half or two hours, then went out onto the landing or platform. When appellee got to the top step she slipped and fell down three of the steps. As she slipped she grabbed her husband who also fell, and his hat was knocked off. She testified that after she fell her clothes were muddy and wet. Her husband testified that when he got up to get his hat, the top step was wet and as slick as glass; that he went back the next day and it looked as though a piece underneath the top step was cracked and that the step sloped or was broken off; that it sloped about half an inch toward the steps. Eva L. Donaldson was just entering the theatre and she immediately went to the assistance of appellee. She

estified that the steps were wet and mud had been tracked in on hem; that when she went into the theatre it was between 7:30 and :30; that about seven o'clock it was misting a little but the rain ad slacked up a great deal. The house manager of appellant testified that he was in the lobby at the time of the accident and he ade a thorough examination of the steps; that there was no mud on hem; that the top step was dry and in good order; that if there was slope to the top step it was very slight, not as much as half an nch; that he had never examined the step to see whether it was worn; hat it possibly was worn some; that there were no mats on the steps. he ticket taker, who was in the lobby, testified that he looked at he steps after the accident and they were absolutely dry; that there as no mud on them; that they might have been wet during that day, ut they were absolutely dry during that evening. After appellee ell she was taken to a hospital in an ambulance. The conductor of he ambulance was called as a witness and testifies that when he went fter her she was sitting in the rear of the lobby; that as he remembered, the floor of the lobby that night was dry; that he did not otice the condition of the steps, all he noticed was the floor.

The declaration charged that it was raining and storming uring the day and that water was carried into the entrance and onto he steps, which became damp, moist, wet and slippery, and dangerous or the customers of the theatre; that appellant failed to have proper ights in the lobby, failed to place mats upon said steps or entrance o prevent the customers from slipping and falling, failed to place a and rail along said steps and to maintain and keep the entrance in good condition for its patrons to enter and leave, and permitted said ntrance to be and become dangerous to its patrons.

The evidence shows that the lobby was reasonably well lighted and that there were hand rails provided. The evidence shows that there were no mats in the lobby. The only act of negligence which the

testified that the steps were wet and mud had been tracked in on them; that when she went into the theatre it was between 7:30 and 8:30; that about seven o'clock it was misting a little but the rain had slacked up a great deal. The house manager of appellant testified that he was in the lobby at the time of the accident and he made a thorough examination of the steps; that there was no mud on them; that the top step was dry and in good order; that if there was a slope to the top step it was very slight, not as much as half an inch; that he had never examined the step to see whether it was worn; that it possibly was worn some; that there were no mats on the steps. The ticket taker, who was in the lobby, testified that he looked at the steps after the accident and they were absolutely dry; that there was no mud on them; that they might have been wet during that day, but they were absolutely dry during that evening. After appellee fell she was taken to a hospital in an ambulance. The conductor of the ambulance was called as a witness and testifies that when he went after her she was sitting in the rear of the lobby; that as he remembered, the floor of the lobby that night was dry; that he did not notice the condition of the steps, all he noticed was the floor.

The declaration charged that it was raining and storming during the day and that water was carried into the entrance and onto the steps, which became damp, moist, wet and slippery, and dangerous for the customers of the theatre; that appellant failed to have proper lights in the lobby, failed to place mats upon said steps or entrance to prevent the customers from slipping and falling, failed to place a hand rail along said steps and to maintain and keep the entrance in good condition for its patrons to enter and leave, and permitted said entrance to be and become dangerous to its patrons.

The evidence shows that the lobby was reasonably well lighted and that there were hand rails provided. The evidence shows that there were no mats in the lobby. The only act of negligence which the

evidence shows is that appellant permitted mud and water to be tracked into the lobby so that the top step was slippery and dangerous and by reason thereof appellee fell and was injured. It is strenuously insisted by appellant that the evidence does not show that the step was wet, muddy or slippery. Three witnesses testified to the wet and muddy condition of the step, and one of them testified that the step was slightly out of repair. Two witnesses testified that the step was not slippery, and one witness did not throw very much light upon that subject. It is contended that appellee was not in the exercise of due care for the reason that the lobby was furnished with hand rails on each side which she could have used and which would have prevented her from falling if she had used them. It is impossible to say as a matter of law that it was the duty of appellee to use the hand rails. From the evidence it appears that she came out of the theatre the same as any ordinary person would have done. The question as to whether she was in the exercise of due care, and whether appellant was guilty of the negligence charged in the declaration, were questions of fact for the jury. This court would not be justified in setting aside the verdictunless we can say that the finding of the jury upon these questions is manifestly against the weight of the evidence which we do not feel justified in doing.

It is insisted that the amount of the judgment is excessive. The evidence shows that a bone was broken in appellee's left ankle and some of the ligaments were torn. The fracture was reduced in the hospital at Peoria where she remained for nine days. She was then removed in an ambulance to her home. The evidence shows that she suffered considerable pain. It was eight months before she was able to step upon her foot. The trial was a year and a half after the accident. She testified that her limb was weak at the time of the trial and that she could not walk as fast as she could before the

ccident; that she could not run; that when she walked fast she uffered pain from the hip to her foot; that her ankle pained her ll of the time; that after she walked or used her foot, it swelled p so she had to take off her shoe; that she was under the care of wo physicians who treated her at Springfield for several months. n addition to the pain and suffering, she was compelled to pay ospital and doctor bills. The question as to the amount of a erdict is largely within the discretion of the jury. A court of eview will not reverse a judgment on account of the amount unless t appears that it is clearly excessive, and the result of passion nd prejudice on the part of the jury. Cribben vs. Callaghan, 57 ll. App. 544; McFarland vs. Jackson, 189 Ill. App. 453; Fisher vs. ity of Chicago, 189 Ill. App. 492; Tull vs. Clarke, 209 Ill. App. 48. We do not feel justified in this case in saying that the ver- ict is excessive.

Complaint is made of instructions given and refused. There s considerable confusion with reference to which instructions are ntended to be criticized. The instructions are not numbered and our attention is called to them by the pages of the abstract, but it is apparent that counsel is in error in the pages to which our attention has been called. It is of the utmost importance that the nstructions should be numbered so that we know exactly which instructions are questioned.

The complaint against the first and third instructions on behalf of appellee is that they refer to the declaration for the elements necessary to make up appellee's cause of action. Instructions of this kind have been criticized and condemned in a long line of cases. Krieger vs. Aurora, Elgin & Chicago R. R. Co., 242 Ill. 544; Laughlin vs. Hopkins, 292 Ill. 80; Lerette vs. Director General, 306 Ill. 348; Long vs. City of Rock Island, 234 Ill. App. 365. It has not been held in all cases that the giving of such instructions constitute reversible error. In some cases it has been held, on account of the particular facts, that such an instruction did constitute

reversible error, while in other cases it has been held that such an instruction does not constitute reversible error. Appellant's third given instruction contains the same vice. It does not specifically mention the declaration, but it tells the jury that the burden is on appellee to establish the material facts necessary to prove her case. It logically follows that the meaning of the words, her case, is her case as alleged in the declaration. We do not feel justified in reversing the judgment on account of these instructions.

Complaint is made of the fourth instruction on behalf of appellee which is erroneously called the third instruction. It is insisted that this instruction advises the jury as to the preponderance of the evidence and the credibility of the witnesses, and that it is a mixture of both and therefore is erroneous. We do not think the instruction is capable of this interpretation.

The second instruction refused on behalf of appellant tells the jury of the duty which appellant owed to its patrons in furnishing them with a reasonably safe entrance and exit to its place of business. This instruction announces a correct rule of law as laid down inDeitze vs. Riverview Park Company, 181 Ill. App. 357; Noack vs. Wosslick, 182 Ill. App. 425; Jerrell vs. Harrisburgh Fair & Park Association, 215 Ill, App. 263; Orourke vs. Marshall Field & Company, 307 Ill. 197. The second instruction given on behalf of appellant covered all of the facts necessary for the information of the jury with reference to the duty of appellant in this regard, and therefore it was not error to refuse the second instruction.

The third instruction refused, told the jury that the burden of proof was on appellee to show that a defective condition had existed so long before the accident that appellant, in exercising reasonable care, ought to have known of it and removed it. In Orourke vs. Marshall Field & Co., supra, on page 201, the court

said: "It is not necessary that neglect such as is charged here should have been operative for any particular length of time or at any particular time. The declaration charges in effect that it was the present proximate cause of the injury to plaintiff." Under this authority, the third instruction was properly refused.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6 th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

resent--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 635

BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 - 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

F. J. Miller,

appellee,

vs.

Christian Scheler and Loren Scheler, co-partners doing business as Christian Scheler & Son,

appellants,

Appeal from the City Court of Sterling.

243 I.A. 635

Partlow, P. J.

Appellee, F. J. Miller, began suit in the city court of Sterling against appellants, Christian Scheler and Loren Scheler, who were partners, for $431.50 alleged to be due as wages. There was a trial by jury, verdict and judgment in favor of appellee for $429.50, and an appeal has been prosecuted to this court.

Appellants, claimed that the judgment is not sustained by the evidence. A bill of particulars was filed in which appellee claimed $826.00 for wages in 1925; $8.00 for services at an oil station from January 1, 1926, to January 4, 1926, inclusive; with a credit of $300.00 cash, and $102.50 for merchandise furnished appellee.

The evidence shows that appellee began work for Christian Scheler in 1915, in a farm implement store in Rock Falls, Illinois. At first he was paid a commission. From 1920 to 1924, it is undisputed that he was to be paid and was paid $626.00 per year. Appellee testified that in July, 1924, after the store was moved to Sterling, Illinois, he had a talk with Christian Scheler with reference to his salary in which he asked Scheler if he did not think appellee's time was worth more in Sterling than it had been in Rock Falls, and Scheler replied "the way things are going it would be." Scheler denied he ever had such a conversation with appellee. It was the custom for appellee to run a book account each year and the amount of the book account was deducted from his wages at the end of the year. During 1924 his account was $98.95. In August, 1924, appellee drew $200.00 in cash, which

October Term, 1926.

T. J. Miller,

appellee,

vs.

Appeal from the City Court of Sterling.

Christian Sobeler and Loren Sobeler, co-partners doing business as Christian Sobeler & Son,

appellants.

2431 A. 635

Partlow, P. J.

Appellee, T. J. Miller, began suit in the city court of Sterling against appellants, Christian Sobeler and Loren Sobeler, who were partners, for $451.50 alleged to be due as wages. There was a trial by jury, verdict and judgment in favor of appellee for $429.50, and an appeal has been prosecuted to this court.

Appellants claimed that the judgment is not sustained by the evidence. A bill of particulars was filed in which appellee claimed $336.00 for wages in 1925; $8.00 for services at an oil station from January 1, 1926, to January 4, 1926, inclusive; with a credit of $300.00 cash, and $102.50 for merchandise furnished appellee.

The evidence shows that appellee began work for Christian Sobeler in 1915, in a farm implement store in Rock Falls, Illinois. At first he was paid a commission. From 1920 to 1924, it is undisputed that he was to be paid and was paid $636.00 per year. Appellee testified that in July, 1924, after the store was moved to Sterling, Illinois, he had a talk with Christian Sobeler with reference to his salary in which he asked Sobeler if he did not think appellee's time was worth more in Sterling than it had been in Rock Falls, and Sobeler replied "the way things are going it would be." Sobeler denied he ever had such a conversation with appellee. It was the custom for appellee to run a book account each year and the amount of the book account was deducted from his wages at the end of the year. During 1924 his account was

was not charged to him on the ledger. At the end of 1924 appellee received a check for $527.05. Appellants claimed that this settlement was based upon their ledger account which showed only $98.95 for merchandise furnished appellee, and did not show the payment of $200.00. Appellee testified that Lorren Scheler, at the time the check for $527.05 was given appellee, asked appellee if he had received any money during the year 1924, and appellee replied that he had, but that nothing was said as to how much. This is denied by Scheler. Appellee testified that at the time of the settlement at the end of 1924, Christian Scheler asked him if appellee would keep on for another year, and appellee told Scheler that he would, but that nothing was said relative to wages. This also is denied by Scheler. During 1925, nothing further was said regarding wages. On or about January 4, 1926, Mrs. Loren Scheler, who kept the books, handed appellee a statement, together with a check for $223.50, being the balance for wages during 1925. Appellee told her that the amount was not enough. Christian Scheler asked appellee what the trouble was and appellee said he wanted what he was paid the year before. Scheler said that was all he gave appellee the year before. Appellee then told Scheler that he had given him $200.00 more and Scheler said that he had not. Appellee called Scheler's attention to the fact of his having received $200.00 in August, 1924, and Scheler said that if he did pay him $200.00 in August, that he had forgotten to put it down but that he would look it up. The next morning Scheler showed appellee the cancelled check for $200.00 that had been paid to him and handed appellee a check for $23.50, which appellants claim was the balance due for 1925. Appellee said that if that was all Scheler was going to pay him he was not going to stay. Scheler told appellee he would pay him for working at his gas station during 1926, and handed him four one dollar bills for his work. Appellee picked up the check and the four one dollar bills and walked out. He testified he told Scheler he was going to get some advice. Scheler testified that appellee

took the check and money and went away without saying anything about getting advice. About an hour later appellee came back with the check and money, told Scheler he was quitting, threw the check and money on the counter, and Scheler testified that he told appellee he had better take care of his money and check; that Scheler would not be responsible for them.

The question is whether this evidence showed there was an agreement for an increase of wages for 1925, and whether appellants owed appellee $431.50, or whether they owed him only $23.50. It is apparent from this evidence that when the settlement was made for 1924 that appellants did not take into account the $200.00 which had been paid in August. This amount appeared upon the cash book, and was evidenced by a check, but did not appear upon the ledger. Because of these facts, appellants paid appellee $200.00 more than they had paid him the year before. A disinterested witness testified that during 1925, he had a conversation with appellee in which appellee said that appellants were always making mistakes, and he said they had made one mistake they did not know anything about; that appellee knew about a mistake of $100.00 but appellants did not know about it. Appellee did not say whose mistake it was nor who it was against. This evidence is not disputed by appellee, and we are of the opinion that appellee knew that the payment for 1924 was by mistake and that he received $200.00 more than he should have received, but he did not inform appellants of that fact. It is very apparent, even if appellants agreed to employ him for 1925, that they did not intend to employ him at the increased wages. The burden of proof was upon appellee to establish that appellants were indebted to him. No witnesses support him in his contention. On the other hand, two witnesses testified on behalf of appellants, that there was no new contract entered into, and that appellants did not agree to pay the increase of $200.00 for the year 1925. The verdict and judgment are manifestly against the weight of the evidence

took the check and money and went away without saying anything about getting advice. About an hour later appellee came back with the check and money, told Schafer he was quitting, threw the check and money on the counter, and Schafer testified that he told appellee he had better take care of his money and check; that Schafer would not be responsible for them.

The question is whether this evidence showed there was an agreement for an increase of wages for 1928, and whether appellants owed appellee $4631.50, or whether they owed him only $4331.50. It is apparent from this evidence that when the matter was made for 1928 that appellants did not take into account the $300.00 which had been paid in August. This amount appeared upon the cash book, and was evidenced by a check, but did not appear upon the ledger. Because of these facts, appellants paid appellee $300.00 more than they had paid him the year before. A disinterested witness testified that during 1928, he had a conversation with appellee in which appellee said that appellants were always making mistakes, and he said they had made one mistake they did not know anything about; that appellee knew about a mistake of $100.00 but appellants did not know about it. Appellee did not say whose mistake it was nor who it was against. This evidence is not disputed by appellee, and we are of the opinion that appellee knew that the payment for 1928 was by mistake and that he received $300.00 more than he should have received, but he did not inform appellants of that fact. It is very apparent, also if appellants agreed to employ him for 1928, that they did not intend to employ him at the increased wages. The duties of plaintiff was upon appellee to establish that appellants were indebted to him. No witnesses support him in his contention. On the other hand, two witnesses testified on behalf of appellants, that there was no new contract entered into, and that appellants did not

and for that reason the judgment will be reversed and the cause remanded.

Other errors are urged but it will not be necessary to consider them.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6 th day of Dec. in the year of our Lord one thousand nine hundred and twenty six.

Justus L. Johnson

Clerk of the Appellate Court

a instructed

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 635

BE IT REMEMBERED, that afterwards, to-wit: On DEC 8 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

A. Countryman,
Appellant,

vs.

rmers' Grain Company of
mond, Illinois, a Corporation,
Appellee.

Appeal from the Circuit Court of DeKalb County.

243 I.A. 635

rtlow, P. J.

Appellant, M. A. Countryman, began an action of trespass on e case in the circuit court of DeKalb county, against appellee, rmers' Grain Company of Esmond, Illinois, a corporation, to recover der a landlord's lien upon certain corn which appellee purchased d for which appellee paid the tenant, A. J. Boken. There was a ial by jury, verdict and judgment for appellee, and this appeal was osecuted.

The evidence shows appellant owned a farm in Ogle county. He xecuted a written lease to Boken from March 1, 1918, to March 1, 1919. ppellant was to receive one-half of all grain. The corn was to be ivided in the crib. Pasture and meadow lands were to be cash at 6.00 per acre. The declaration alleged that all indebtedness owed by oken to appellant under the lease from March 1, 1918, to March 1, 1919, ad been paid in full, and the proof so shows. After March,1, 1919, oken held over for another year without a new lease. In the fall of 919, Boken shucked the corn and put it in a double crib, one side ontaining the corn of appellant and the other side containing the corn elonging to Boken. There was a conversation between Boken and appel- ant with reference to the sale of this corn and it was agreed that it hould be sold as soon as the price was right. Just prior to December , appellant telephoned to John Campbell, the manager of appellee, and sked the price of corn, which Campbell told him. Campbell testified hat appellant replied that the price sounded pretty good to him, and e asked Campbell to call Boken and tell him that the price was satis-

Appeal from the Circuit Court
of DeKalb County.

2431 A. 637

actory to appellant and to let the corn go if it was all right with oken. Appellant testified that he told Campbell that appellant would ell the corn on his place that had been farmed by Boken. Campbell estified that he called Boken and it was agreed that the corn should e sold. Boken delivered at the elavator $4240.81 worth of corn. Of his amount Campbell paid Boken $1926.77, and $2314.04 was the amount ue appellant, from which was deducted $25.52 which appellant owed ppellee. A few days after the delivery appellant had a conversation ith Campbell in which he claimed that Boken was not entitled to the ull amount of money which appellee had paid him. Appellant claimed hat Boken owed him $209.52 for corn, $168.36 for pasture rent, and 1.45 for seed. Appellant refused to accept the check for his share f the corn and did not accept it for almost a year after the transction, and did not begin suit against appellee until almost four ears thereafter. He did, however, begin suit against Boken for what e claimed was due.

This judgment will have to be reversed on account of erroneous nstructions and because of that fact we refrain from expressing any pinion on the merits of the case.

The fifth instruction on behalf of appellee, among other things, old the jury that if they believed from the evidence that appellant, n any manner, acquiesced in selling the corn by the tenant, then ppellant could not recover. The instruction did not tell the jury n what manner appellant would have to acquiesce before his rights ould be barred. Certain acts of acquiescence might constitute a aiver and certain other acts might not, depending upon what the acts ere. Whether there was in fact such an acquiescence as barred a reovery was a question of fact for the jury and it was error to instruct he jury that if appellant in any manner acquiesced in selling the corn y the tenant that he could not recover.

Complaint is made that the fourth instruction given on behalf f appellee, in three different places, assumes, or tells the jury,

t the corn was sold by Boken. The instruction is subject to this
ticism. The evidence is in conflict as to who sold the corn andthe
truction was erroneous in this respect. The instruction also told
jury, among other things, that before appellant could recover, he
t prove by the preponderance of the evidence that appellee purchased
corn with the fraudulent intent and purpose of impairing or depriving
ellant of his lien. In Watt vs. Scoffield 76 Ill. 261, and Finney
Harding, 136 Ill., 573, it was held that the lien of a landlord is
defeated by a sale of grain by a tenant to a person who had notice
the fact of the tenancy, or of facts sufficient to put the purchaser
n inquiry. It is practically conceded by appellee that the instruction
erroneous, but it is insisted that the error was corrected by the
rth instruction given on behalf of appellant which states the rule
announced in the cases cited. The two instructions were in direct
flict, and the one announcing the correct rule did not rectify the
or in the other one.

The judgment will be reversed and the cause remanded, The cost
the additional abstract will be taxed against appellee.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8 th day of Dec., in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 635

BE IT REMEMBERED, that afterwards, to-wit: On DEC 11 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

First Trust & Savings Bank of Morris, Illinois

Defendant in Error,

vs.

I. B. Walker,

Plaintiff in Error.

Writ of Error to the Circuit Court of Grundy County.

243 I.A. 635

Partlow, P. J.

In vacation, during the January term, 1923, of the circuit court of Grundy county, defendant in error, the First Trust & Savings Bank, of Morris, Illinois, obtained two judgments by confession. The first one was against E. W. Walker & Sons, E. W. Walker, and I. B. Walker, and was on two promissory notes for $2000 and $1478.87, respectively, both dated March 24, 1921, and payable to the Mazon Farmers' Elevator Company. The second judgment was upon two promissory notes dated March 8, 1922, for $3000 and $2000 respectively, payable to the Joliet Trust & Savings Bank, which notes were also signed by Myrtle H. Walker, in addition to the other persons above named. The makers of these notes filed a motion in each of these cases to vacate the judgment, with leave to plead and to offer oral evidence in support of their motion upon the hearing. These motions were heard together upon affidavits, they were denied, and a writ of error was sued out from this court by plaintiff in error, I. B. Walker, to review the ruling of the court.

In support of the motions to vacate, affidavits were filed by I. B. Walker, Eddie W. Walker, Floyd E. Walker, and Myr. J. Walker. The affidavits of I. B. Walker are largely upon information and belief, they state many conclusions, and are entitled to very little weight. The other affidavits allege that on March 22, 1922, Eddie Walker, Floyd E. Walker, Myr. J. Walker and Ollie L. Walker executed a chattel mortgage note for $31,460.08, to defendant in error, secured by a chattel mortgage which was filed for record and was afterwards

Writ of Error to the Circuit Court of Grundy County.

243 I.A. 635

eased on April 17, 1922, but that the note was never returned to
makers but was retained by the defendant in error; that on March
1922, these affiants executed two chattel mortgage notes, one
$19,235.30, and the other for $15,000. The first one was payable
defendant in error and the second was payable to J. W. McKindley,
Morris, Illinois; that on the same date, a chattel mortgage was
cuted to secure the two notes; that the note for $19,235.30 was
ivered to defendant in error in payment of the principal and inter-
of notes and accounts due from the makers to defendant in error
luding the two notes dated March 24, 1921, now in controversy; that
March 24, 1922, J. W. McKindley, who was president of defendant in
or, sent to the Mazon Farmers' Elevator Company a check for $3782.12
full payment of the notes which are the basis of the first judgment
this case, and that the Mazon Farmers' Elevator Company retained
session of said notes until August 14, 1922; that prior to said last
McKindley and W. R. Gray had repeatedly requested E. W. Walker to
render the two notes held by the Mazon Farmers' Elevator Company;
t on August 14, 1922, McKindley and Gray called on E. W. Walker and
him that if he did not sign an order on the Mazon Farmers' Eleva-
Company, ordering it to turn the two notes over to defendant in
or that defendant in error ~~that defendant in error~~ and McKindley
ld foreclose the chattel mortgage on the following morning and put
W. Walker out of business; that under said threat E. W. Walker signed
order; that at that time defendant in error and McKindley had no
ht to said notes or either of them; that McKindley and defendant in
or had accepted the chattel mortgage note of March 22, 1922, in pay-
t of other debts and thereafter had agreed to surrender said notes
accept the chattel mortgage note of $19,235.30 in payment of said
ts.

The affidavits further alleged that the $19,235.30 note was also
en in payment of the liability on account of defendant in error

orsing the two notes of the Joliet Trust and Savings Bank which are
in judgment; that on the execution and delivery of the $19,235.30
e to defendant in error, the two notes which are the basis of the
ond judgment were fully paid and should have been surrendered, but
t after said notes were fully paid, defendant in error wrongfully
pt said notes and entered judgment thereon; that after the execution
the chattel mortgage note of March 22, 1922, and the two chattel
rtgage notes of March 31, 1922, defendant in error delivered to af-
ant a statement in writing showing that all of said notes were fully
id, which statement in writing is set out in full in the affidavit.

There was also an affidavit from G. E. Mullen, general
nager of the Mazon Farmers' Elevator Company in which he alleged that
March 24, 1922, McKindley sent to affiant a letter containing a
eck for $3782.12 in payment of the two notes, dated March 24, 1921,
ich letter stated that the check was in full payment of all notes and
ok accounts of E. W. Walker and Sons to date, and requested that all
pers be sent to defendant in error to show that the debt was paid in
ll. The affidavit also alleged that on August 14, 1922, Gray and
Kindley called on affiant and presented an order from E. W. Walker
ich directed that the Mazon Farmers' Elevator Company deliver to
fendant in error one promissory note dated March 24, 1921, for
478.87, and one promissory note for $2000 of the same date, and con-
uded as follows: "said First Trust & Savings Bank having bought and
id for these notes, you are hereby directed to transfer them to said
nk without being marked paid or cancelled"; That on receipt of this
der affiant turned the two notes over to McKindley in accordance with
e directions of said order.

The question for determination is whether the affidavits set
p such a state of facts as entitled plaintiff in error to have the
udgment opened, and whether he has been guilty of such laches as barred
his right.

An application to open a judgment by confession should be

de at the earliest opportunity. Hall vs. Jones, 32 Ill. 38. The plication is addressed to the sound discretion of the court. In veral cases a delay of several months has been held to be too long. sner vs. Truax, 195 Ill. App. 285; Freeman vs. Counsell, 203 Ill. p. 333. Whether the parties have been guilty of laches depends on the particular facts in each case. For several months before the tion was made to open the judgment, plaintiff in error knew that the dgment had been rendered. There is very little reason given for his delay. When the question of his laches is considered in connection th the facts set out in the affidavits to open the judgment we think e court should have allowed the motion and permitted plaintiff in error present his case to a jury. The judgments amount to over $10,000. e affidavits tend to show that the notes which were the basis of these dgments were paid by the notes secured by the chattel mortgages. If e notes were paid, then plaintiff in error's liability thereon ceased, d defendant in error wrongfully caused judgment to be entered on the tes. The facts were such as to entitle plaintiff in error to a dicial determination of his liability and the court should have ened the judgment with leave to plaintiff in error to plead.

The judgment will be reversed and the cause remanded with irection to allow the motions to open the judgments, with leave to lead.

Reversed and Remanded with directions.

'ATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in d for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the ove entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 11th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: On DEC 11 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gustave Becker,
Appellee,

vs.

F. E. Bess,
Appellant.

Appeal from the Circuit Court of Whiteside County.

243 I.A. 636

Partlow, P. J.

Appellant, Gustave Becker, began suit for $252.42, before a justice of the peace of Whiteside county, against appellee, F. E. Bess. From the judgment of the justice, an appeal was prosecuted to the circuit court where there was a trial by jury, verdict and judgment in favor of appellee, and an appeal has been prosecuted to this court.

The evidence shows that appellant owned a farm of 160 acres of land in Whiteside county. He executed a lease to appellee for one year from March 1, 1924. Appellee was to pay cash for pasture and hay lands, all of which has been paid. Each party was to have one-half of all grain raised. Appellee was to furnish his own horses, cattle and hogs, and to feed the same. None of the grain while growing, or after it was gathered, was to be fed to the livestock of appellee, but it was to be harvested and put in bins or cribs. Appellant claims that he did not get his share of the grain and that appellee owed him for various items of property.

A bill of particulars was filed by appellant and was made up of eight items as follows; 140½ bushels of corn fed by appellee to his hogs, $154.27; 61½ bushels of oats, $30.75; 3 bushels of seed corn, $6.00; 13 2/3 rods of woven wire, $8.20; 16 fence posts and 2 fence braces, $7.28; 32 rods of pasture fence posts burned or destroyed, $14.80; brace wire, $1.18; labor in putting in pasture fence, $10.00.

The evidence is in conflict as to each item and some of it is uncertain, indefinite and unsatisfactory. The claim for

Appeal from the Circuit Court of Whiteside County.

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bushels of corn alleged to have been fed to appellee's hogs, pparently based on the fact, as testified to by appellant, he received 856 bushels of corn, while appellee received ½ bushels, a difference of 240½ bushels, of which one-half nged to appellant. This item does not come within the bill of iculars unless this corn which appellant claims he did not re-e, was fed to the hogs of appellee. The evidence on this item ot confined to corn fed to the hogs. There is some evidence appellee did feed corn to his hogs for which he did not account, he evidence of this fact is very uncertain, especially as to mount. On the other hand, evidence was admitted under this item an unequal division of hard and soft corn; an unequal division rn by rows, and in the crib; and damages to 150 bushels of all by reason of hogs running in the corn. Two witnesses called by lant testified they measured the corn after it was put in the and that appellee had 659 4/5 bushels and appellant had 856 ls, a difference of 196 1/5 bushels in favor of appellant. At the evidence on this item was a mere estimate and was not found-any adequate basis. As to the 61½ bushels of oats, the evidence that the machine measure was 1650 bushels which were divided ly. Appellant claims there were 1773 bushels by actual weight. ats were not sold when they were threshed. There was a conflict e evidence as to who was to stand for the shrinkage. Appellant ed that appellee was to stand for it, which was denied by lee. This is about all of the evidence that there is with re-ce to this item. As to the $6.00 for seed corn, the evidence is that appellee was to furnish the seed corn. He did furnish eed corn and planted it, but the first planting did not come up. lee testified he called appellant on the phone and told him that orn did not come up, and if he would again furnish the seed,

ppellee would replant it, and appellant agreed to do so. This is enied by appellant. As to the wire fence and posts, the evidence hows that they were old and of very little value. The evidence of ppellee was that the wire was left on the farm when he moved away, nd that he did not burn or destroy the posts. In this condition of he evidence, as to all of these items in the bill of particulars, t was a question of fact for the jury to determine whether the vidence sustained the claim of appellant as to the different items. he jury was justified in its conclusion that the evidence did not ustain appellant's claim as to any of the items. Even if a verdict ad been returned in favor of appellant as to any item, it is very oubtful if it could have been sustained under the evidence.

The instructions are not numbered, and it is very difficult o determine just which ones are criticized. Appellant contends that he second, third, fourth and fifth instructions offered by him were properly refused. The abstract shows that only four instructions ere refused on behalf of appellant. We have examined each of them. ome of them refer to the terms of the lease which does not appear in he abstract, therefore, we are unable to tell whether they are in ompliance with its terms or not. All of them are much broader than he bill of particulars and include items that are not specified in he bill of particulars, including damages to buildings, damages to he premises in general, and a violation of the terms of the lease in eneral. On account of not being limited to the evidence in the case nd the items specified in the bill of particulars, each of them was roperly refused. Complaint is made of the second instruction given n behalf of appellee but it announces a correct rule of law and as properly given.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

TATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
d for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
o hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
ove entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 11th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

5662a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: On DEC 15 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

ALBERT R. NEWPORT,

Appellee,

-vs-

BERT C. NICHOLSON,

Appellant,

Appeal from the Circuit Court of Grundy County.

243 I.A. 636

Jett, J.

Albert R. Newport, appellee, recovered a judgment against Bert C. Nicholson, appellant, for the sum of $378.28 for damages to his automobile caused by a collision between it and a traction engine drawing a saw mill along a public highway, from which judgment appellant prosecutes this appeal.

A number of reasons are assigned and argued by appellant for a reversal of the judgment. It is first insisted that the court erred in granting leave to appellee, after the beginning of the trial, to file four additional counts to the declaration. Allowing the filing of additional counts to the declaration during the trial is a matter of discretion with the court. Bell vs Toluca Coal Co. 272 Ill. 576, 582-583. We are of the opinion the court properly allowed appellee to file the additional counts and that no error was committed in so doing. After the filing of the additional counts, appellant made a motion for a continuance. The court denied the motion. The motion does not appear in the bill of exceptions. A motion for a continuance and the order denying the same are not preserved for review unless included in the bill of exceptions. Kimber vs Kimber, 317 Ill. 561, 565-566. Furthermore there is nothing to show that the appellant was in any way surprised by the action of the court in allowing the additional counts to be filed, therefore he is not in a position to complain. Since no motion for a new trial is contained in the bill of exceptions, we are, not in a position to consider the weight of the evidence or whether appellee was guilty of contributory negligence or the servants of appellant guilty of negligance as charged in the declaration. Greenwell vs Hess, 298 Ill. 459-461-462.

On review, in order to question the sufficiency of the evidence to sustain the verdict and judgment, a motion for a new trial, denied and excepted to, is necessary. Yarber vs C. & A. Ry. Co., 235 Ill. 589, 597; Oil Belt Ry. Co. vs Lewis, 259 Ill. 108; Guth vs Haas, 210 Ill. App. 437, 438.

It is urged that the motor vehicle law does not apply to the traction engine involved in the collision in this case. Section 1 of the Act to regulate motor vehicles provides: "Wherever the term 'motor vehicle' is used in this Act, it shall be construed to include automobiles, locomobiles, motor-bicycles, tractors, traction engines, and all other vehicles propelled othervise than by muscular power, and including also vehicles or trailers, or semi-trailers pulled or towed by a motor vehicle,***". The proviso in section 9 of the motor vehicle act providing license fees for vehicles of the second class, 'that nothing in this act shall be construed to include tractors, traction engines or other similar vehicles used exclusively in agricultural pursuits or used by residents of this state in any kind of road work', does not exempt the owner of the traction engine in question from meeting the requirements of sections 16, 21 and 40 of the Motor Vehicle Act in relation to lights, signals, brakes and manner of approaching others upon the highway.

The traction engine of appellant was not used exclusively in agricultural pursuits. Peterson vs Industrial Commission, 315 Ill. 199-202. It was used to operate and haul about the country a saw mill which appellant used in his business. His occupation was buying tracts of timber, cutting, sawing and selling the lumber. We are of the opinion that the traction engine came within the provisions of the Motor Vehicle Act with reference to operation on the public highway and that it was being operated on the highway with out any lights and as a result the injury to appellee's car was occasioned.

On review, in order to question the sufficiency of the

[illegible] and imagined to, is unsolved. [illegible]

[illegible] 119 Ill. 589, 597; Ott Bell [illegible] Cox vs Fowle, 250 Ill. 108; [illegible]
[illegible] 210 Ill. App. 497, 488.

It is urged that the motor vehicle law does not apply to the
[illegible] involved in the collision in this case. Section 1
[illegible] to regulate motor vehicles provides: "Wherever the term
[illegible] vehicle' is used in this Act, it shall be construed to include
[illegible], locomobiles, motor-bicycles, tractors, traction engines,
all other vehicles propelled otherwise than by muscular power,
including also vehicles or trailers, or semi-trailers pulled or
[illegible] by a motor vehicle,****". The proviso in section 9 of the motor
[illegible] provides [illegible] licenses need not be issued for vehicles of the second class,
[illegible] nothing in this act shall be construed to include tractors,
traction engines or other similar vehicles used exclusively in agri-
[illegible] or used by residents of this state in any kind of
[illegible] work', does not exempt the owner of the traction engine in
[illegible] from complying the requirements of sections 16, 21 and 40 of
[illegible] the Act in relation to lights, signals, brakes and number
[illegible].

The traction engine of appellant was not used exclusively
[illegible]. Peterson vs Industrial Commission, 313 Ill.
[illegible] It was used to operate and haul about the country a saw
[illegible] mill as well as used in his business. His occupation was pur-
[illegible] chasing stands of timber, cutting, sawing and selling the lumber. We
[illegible] are of the opinion that the traction engine came within the provisions
[illegible] of the Motor Vehicle Act with reference to operation on the public
[illegible] highways and that it was operated on the highway with out any
[illegible] and as a result the injury to appellees car was occasioned.

It is also urged by the appellant that there is a variance etween the pleadings and the evidence. Appellant insists that since he evidence shows that the automobile ran into and collided with the raction engine while the engine was standing, where the declaration harges a collision between them, causes a variance which constitutes eversible error.

In South Chicago City Ry. Co. vs Kinnare, 216 Ill. at page 52, the court said: "The mode or manner in which such alleged egligence caused the death of appellee's intestate is somewhat ifferently stated. The cause of action is the thing done or ommitted o be done from which the right of action arose", and as to this the llegations and the proofs are not different. In Vol. 11, Corpus uris 1011 it is said: "The apprehension seems to be that a "collis-ion" must be between two moving objects coming together. The meaning the word, and the law, does not support this theory. A collision y as well be with an immovable object as with a movable object. ollision may be defined as "a striking against". Collision with, ans "strike against", and includes collision with immovable as well movable objects."

There is no variance between the pleadings and the proof. reover there is a reason which obviates this contention. The estion of a variance was not specifically pointed out on the trial. have examined the bill of exceptions and have failed to find where e question of variance was raised in the trial court and if not ised there it cannot be raised upon appeal.

We have examined the instructions complained of and do not nk there is any merit in any of the errors assigned thereon nor is re error in the ruling of the court on the admission or exclusion evidence.

We are of the opinion that no reversible error was committed the trial of the case. The judgment of the Circuit Court of ndy County is affirmed.

Judgment affirmed.

'ATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in d for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, hereby certify that the foregoing is a true copy of the opinion

the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court

5663a

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

resent--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: On DEC 15 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7658

Agenda 38

LEON D. HOFER,

Appellee,

-vs-

CHICAGO, BURLINGTON and QUINCY RAILROAD CO., a corporation,

Appellant.

Appeal from the Circuit Court of Peoria County.

243 I.A. 636

Jett, J.

Appellee, Leon D. Hofer, instituted suit in the circuit Court of Peoria County against the Chicago, Burlington and Quincy Railroad Company, appellant, to recover damages for injuries suffered by him when he was struck by a train of appellant at a farm crossing in Peoria County.

There have been three trials of this cause. Upon the first trial the jury disagreed. Upon the second trial the jury returned a verdict in favor of appellee for $4,500. An appeal was prosecuted by the appellant to this court and the case was reversed and remanded and the opinion filed is No. 7374. After the cause was remanded it was redocketed in the Circuit Court of Peoria County and the third trial resulted in a finding in favor of appellee in the sum of $4,500, upon which judgment was rendered and appellant prosecutes its second appeal to this court. A full statement of the facts will be found in the opinion filed in No. 7374.

In our former opinion when this case was before us, we among other things, said:

"We next come to the question as to whether appellee was in the exercise of reasonable care. The preponderance of the evidence shows that from the crossing there is a clear view at least to the bridge, which is about a quarter of a mile away, and some of the witnesses testified the view was not obstructed for a considerable distance beyond the bridge. Appellee claims the telegraph poles on the south side of the right of way obstructed the view, but the

Appeal from the Circuit
Court of Peoria County.

2431 I.A. 636

idence shows that the lowest cross arm on these poles was sixteen et above the ground, and therefore could not have made much of an struction. It is also claimed that the girders of the bridge ob- ructed the view. Several photographs showing the track east of the ossing were offered in evidence, and from these and the other evidence do not think appellee has established his claim that he could not e the train because of obstructions between him and the bridge, or en beyond it. It is admitted that afternoon was clear. When appellee opped to open the gate his truck was facing west or northwest. There re no curtains or obstructions on the right side of the truck, but ere was a load of coal on the rear which may have obstructed the ew in that direction. He testified that when he got out of the uck to open the gate he looked to the west and saw no train. He en opened the gate and looked in the other direction and saw no ain. He testified he could see beyond the bridge a quarter of a le, which would make a half a mile from the crossing; that he could ve seen a train the whole distance to the bridge. He testified he t into the truck and started up the grade onto the tracks. His uck turned from the west or northwest directly to the north. By aning forward as he went through the gate and up the grade and oking to the east he could have seen the train. The track curved the southeast, but he testified he could have seen the bridge, but did not look and was struck. After the injury he was put on a retcher and placed in the baggage car. Several witnesses testified statements made by him at that time. He asked how badly his truck damaged, and stated what relatives of his should be notified. witness testified he said to appellee:- "For goodness sake man, ldn't you see that train coming?" and appellee replied, "No, I n't - I was watching the fellows across the tracks, who were ing at me, and I thought they wanted to come across the track

irst before I did." He also said: "You bet I will never cross that rossing again without looking." Another witness testified appellee aid he drove onto the track without looking. The men who were in he Hoffman truck on the Peoria and Southport road, west of the cross- ng, testified they tried to warn appellee and call his attention to he train, but he did not pay any attention. They could see him in the b behind the wheel, but they did not know whether he saw them.

The driver of an automobile approaching a railroad crossing bound, where the view is unobstructed, to make a reasonable use of s senses to guard his own safety, and to look for approaching trains such a distance as will enable him to ascertain whether a train is sight, and his failure so to do constitutes negligence. Chicago, ck Island & Pacific Railroad Co. vs Jones, 135 Ill. App. 380; Kennedy Alton Traction Co., 180 Ill. App. 146; Stein vs Chicago & Eastern linois Railroad Co., 199 Ill. App. 48; Hack vs Chicago Interurban Traction Co., 201 Ill. App. 572. In Gray vs Chicago & Northwestern ilroad Co., 155 Ill. App. 428, on Page 431, it is said: "On e other hand, plaintiff's testimony demonstrates that while he may ve looked for an approaching train while standing in front of the evated train, he did not look for it while approaching the defendant's acks. Had he done so he must have inevitably seen it, as there was thing whatever to obstruct his view. This was in our judgment under the circumstances, clearly such contributory negligence as justified irection of a verdict of not guilty." The question of contributory ligence is a question of fact for the jury, Chicago & Alton Rail- d Co., vs Pollock, 195 Ill. 156, but under the evidence in this e we think the finding of the jury that the appellee was in the rcise of due care and caution for his own safety is manifestly against weight of the evidence, and when this fact is considered in connection h the further fact that the evidence relative to the negligence of appellant as charged, is very close, we consider it our duty to erse this judgment and remand the cause."

We have examined diligently into the record of the case as it presented to us on this hearing. We have been unable to find any erial difference in the facts as disclosed by the record that is now ore us from what they were when the case was first in this court. question now arises as to what the trial court should do after the e has been submitted to a jury and the Appellate Court has held that evidence was not sufficient to sustain the judgment. Whether or not evidence in a case is sufficient to support a verdict in favor of plaintiff is a question solely for the courts and is never one which ury is permitted to determine. This court has held that the evidence the case at bar is not sufficient to support a verdict for the intiff and we are confident of the correctness of that holding. If evidence on the third trial was substantially the same as it was on second trial it would have been the duty of the trial court to set erdict aside had one been returned in favor of the plaintiff. We lize that such action would not finally dispose of the case but it fair to assume that the plaintiff has produced in this and on the mer trial all the obtainable evidence in his behalf. The procedure nted out by us will not necessarily conclude such cases but as long it is the only method allowed by law it must be followed.

The judgment of the Circuit Court is reversed and the cause anded.

Reversed and remanded.

'ATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in d for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, hereby certify that the foregoing is a true copy of the opinion the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six

Justus L. Johnson

Clerk of the Appellate Court

5664a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: On DEC 15 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

CITY OF LOCKPORT,

Defendant in Error,

-vs-

JOHN D. MEENAN,

Plaintiff in Error.

Error to the Circuit Court of Will County.

243 I.A. 636

Jett, J.

This is a suit instituted by the City of Lockport, a municipal corporation, defendant in error, against John D. Meenan, plaintiff in error to recover from the said Meenan the amount which said city was obliged to pay to one Josephine E. Minarik to secure the release of a judgment the said Josephine E. Minarik had obtained against it in a suit by her for damages for personal injuries sustained as the result of a defective sidewalk. Prior to the trial of the cause of Josephine E. Minarik against defendant in error, the City gave notice to Meenan to defend the case as it was claimed the cause of action was occasioned by reason of his negligence. Pursuant to said notice Meenan, the plaintiff in error, did appear and defend the cause.

It appears that on December 10, 1924, the defendant in error paid to Josephine E. Minarik $2100.00 and costs of suit in full settlement of said judgment against it. Thereafter, the defendant in error brought a suit against Meenan and he defaulted. A judgment was rendered against him for $2652.20 on November 14th, 1925. The plaintiff in error brings this suit here by writ of error and contends that the judgment should be reversed (1) because the suit is upon a written instrument, namely: the judgment against the City of Lockport, and in as much as no copy of said judgment was filed with the declaration it was error to enter the judgment by default; and (2) because the judgment is excessive.

Plaintiff in error misconceives the nature of this proceeding.

Defendant in Error,

County of Will County.

Plaintiff in Error.

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The form of action is trespass on the case. The declaration alleges in substance that by reason of the defective condition of the sidewalk, of which the City of Lockport had actual or constructive notice, one Josephine E. Minarik, through no fault of her own, was injured; that said Josephine E. Minarik sued the City of Lockport and recovered a judgment against it, which the city satisfied; that the defendant, Meenan, an abutting property owner, was the author of the said defect and that he negligently and wrongfully permitted the said sidewalk to remain in the said defective condition, unguarded, and that by reason of these facts he became liable to the City of Lockport for the amount which it was obliged to pay to satisfy the judgment against it, together with the attendant costs; that Meenan was notified of the suit and directed to appear and defend and that he did so appear and defend.

This is not a suit upon a written instrument. It is not a suit upon a judgment as the plaintiff in error contends, but is an action based upon the statute giving the city the right of recovery in certain causes where it has been required to pay damages through the negligent act of a third person. The city sued the plaintiff in error because it was compelled to satisfy the judgment and did not bring the suit to recover on the judgment. There is no bill of exceptions in this cause and therefore we are not in a position to know what evidence was offered, to warrant the entry of the judgment for $2652.20. The error, if any, as to the amount of the judgment must appear upon the face of the record and it does so appear. The declaration contains the express averment that the amount paid in satisfaction of the judgment was $2125. It is well settled that a municipal corporation which has been compelled to pay a judgment to a person injured by a defect in a public sidewalk may, in an action of trespass on the case, recover over against the property owner where it appears that the defective condition of the sidewalk and resultant injury were caused by the negligence of the property owner. City of Canton vs

Torrance, 151 Ill. App. 129; Gridley vs City, 68 Ill. App. 47; Todd vs City, 18 Ill. App. 565; Severin vs Eddy, 52 Ill. 189.

The amount of the recovery, however, is limited to the amount of the judgment, and the attendant costs. No other damages, charges or expenses can be recovered. The limit of the recovery in this cause under the declaration is $2125. plus the interest which had accrued from December 10, 1924 to November 14, 1925 the day on which the judgment was rendered for $2652.20, being eleven months and four days. According to our calculation the interest amounts to $98.55 which added to $2125., the amount of the judgment and attendant costs, makes a total of $2225.55. The judgment is therefore excessive and a remittitur should be entered. This cause will be affirmed provided the defendant in error within twenty days from the filing of this opinion remits the difference between $2652.20 and $2225.55 as of November 14th, 1925. If no such remittitur is entered within twenty days from the filing of this opinion then this judgment will be reversed and the cause remanded.

Affirmed upon entry of remittitur,
otherwise to be reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

5665a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: On DEC 15 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel, L. BRITT, ANDREW INGEMUNSON, and JEROME D. HOLLENBACK, school directors of District No. 31, of the Town of Fox, in the County of Kendall and State of Illinois.

Appellees,

vs

L. H. WICKS,

Appellant.

Appeal from the Circuit Court of Kendall County.

243 I.A. 636

Jett, J.

This is a mandamus proceeding instituted in the name of the People of the State of Illinois on relation of L. Britt, Andrew Ingemunson and Jerome D. Hollenback, school directors of District No. 31 of the Town of Fox, County of Kendall and State of Illinois, appellees, against J. O. Petty, Alfred Christian, L. H. Wicks as trustees of schools of the Town of Fox, Kendall County, Illinois, and Roy M. Scroggin, Township Treasurer of the said Town of Fox in said county and state.

By a petition the school directors of said District No. 31 seek to compel the trustees of schools of Township 36 North, Range Six (6) East of the Third Principal Meridian, in Kendall County, Illinois, to make a division of the funds of Community Consolidated School District No. 5 in said Kendall County, Illinois, between such Consolidated District and the said common school district No. 31, No return was made to the petition of the defendants either individually or in their official capacity. Wicks, one of the trustees, filed a demurrer in which no other defendant joined. The record disclosed that it was filed by him in his individual capacity and that his pleading was not adopted by any of the other trustees. The demurrer was by the court overruled. Wicks elected to stand by his demurrer and judgment was entered directing the defendants to credit to the petitioner district the sum of $1500.00, the said amount being alleged in the petition as being in the hands of the defendants and

Appellees,

vs

Appeal from the Circuit Court of Kendall County.

Appellant.

belonging to common school district No. 31. A prayer for an appeal was entered and an appeal was allowed to the defendants. Wicks is the only one that attempted to perfect an appeal.

It appears that common school districts Nos. 29,30 and 31 of said Town of Fox in said county and state, had been consolidated into what was known as community consolidated school district No. 5. The community consolidated school district was organized under the act of June 24th, 1919 and was composed of only three common school districts among which was district No. 31. Appellees insist that since said common school district No. 31 is detached from the community consoli-- dated school district it is the duty of the trustees of schools to make a division of the funds of the community consolidated district No. 5 between said consolidated district and said common school district No. 31 of said township.

It is the contention of the appellant that in the institution of this proceeding instead of making the corporation, trustees of schools of Township No. 36 North, Range Six, in the county of Kendall, in the State of Illinois, defendants, they proceeded against J. O. Getty, Alfred Christian, L. H. Wicks and Roy. M. Scroggin as individuals, describing the first three as trustees of schools of the Town of Fox, Kendall County Illinois, and the said Roy M. Scroggin as township treasurer of the Town of Fox, in said county and state. While the petition makes the trustees of schools parties defendant by their individual names, it characterized them as trustees of schools of "The Town of Fox". We are of the opinion that service upon them is sufficient to give jurisdiction over them as trustees of schools of township No. 36 North, Range Six.

Section 20 of the School Act makes them a body politic corporate giving them the right to sue and be sued under their prescribed name. Defendants themselves have treated the case as being against

individually. People vs Faltz, 305 Ill. 582; People vs Nordmeyer, Ill. 289 and People vs City of Peoria, 166 Ill. 517 are cited in ort of the contention of appellant that it is proper to make the tees defendants in their individual capacity. The cases relied do not support such contention. They were quo warranto proceedings hich corporate existence was denied, and the right of the defendant xercise official function was challenged. In this case the corpor- existence is not denied, and if it was their duty to make disposition he funds in question, it rested upon the trustees in their corporate city.

In view of the state of the record in this proceeding we do feel called upon to pass upon the merits of the case. The decree, ver, that was entered in this cause must have been rendered upon theory that all of the things well pleaded were admitted by the rrer.

As heretofore stated no return was made to the petition but a rrer was interposed by Wicks. Section 2 of the mandamus act re- es a return to be made by answer or demurrer and in default thereof ment may be taken nil dicit and a peremptory mandamus will be wed. The appeal is prosecuted by Wicks alone. One trustee has no ority to answer for the entire board of trustees. 38 Corpus Juris 884, Sec. 600.

It necessarily follows that one member of the Board of Trustees ot take an appeal. It therefore follows that the appeal should be issed which is accordingly done.

Appeal dismissed.

TATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
nd for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
o hereby certify that the foregoing is a true copy of the Opinion
f the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

5666a

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

resent--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: On DEC 15 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

ITH BONTOFT,

Appellee,

-vs-

NEST E. BONTOFT,

Appellant.

Appeal from the Circuit Court of Winnebago County.

243 I.A. 637

tt, J.

Edith Bontoft, appellee, filed her bill against Ernest E. ntoft, her husband, appellant, for separate maintenance in which charged that since October 1st, 1924, appellant had wilfully erted her without cause, and that she was living separate and apart m him without her fault and is dependent upon the charity of her ends for support. Appellant filed an answer denying the allega- ns of the bill. A hearing was had and a decree was entered order- appellant to pay appellee $5.00 per week and $100.00 solicitors s. Appellant prosecuted an appeal to this court.

For the purposes of this opinion appellee will be called plainant and appellant defendant.

The parties to this proceeding were married August 16, 1923 shortly thereafter began housekeeping. The defendant is thirty 's of age and had been engaged as motorman and operator for the kford City Traction Company in the City of Rockford, Illinois for years. He was in the United States Navy from November 1917 until mber 1919 during which time he had been in South America, North ica, Central America, Spain and Cuba. It appears that while in service he had an ailment that gave him much trouble. About the of September 1924, the defendant became very ill and his wife ed his mother and told her of his condition. His mother went to home and called a doctor. She visited him on the following day. he evening of the 17th of September, 1924, the testimony dis- s that the wife said: "Well if he is going to be very sick,

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you will have to take him home and care for him, he may have something contagious and if I stay around I may get it and she, meaning defendant's mother, would have both of us to take care of." To which his mother replied, "If that is the case I will have a talk with the doctor first." On the 18th of September the defendant was taken to the home of his parents and his wife went with him and remained a short time and then went to the home of her mother. The defendant did not ask her to go to the home of her mother. The defendant was confined to his bed at the home of his mother until the 17th of October. After the defendant was taken to the home of his father and mother the doctor averaged two trips daily for some time. He required much attention, and was cared for almost altogether by his mother. They gave up their furnished rooms, where they had been living and she visited him at his parents home on infrequent occasions. She made little or no effort to help in taking care of him but left that entirely to his parents. He was unable to furnish a home in which to support her and told her he was sorry that he could not take care of her.

To maintain a bill by a wife against her husband for separate maintenance she must show, not only that she had a cause for living separate and apart from her husband but also that such living apart was without fault on her part. Johnson vs Johnson, 125 Ill. 510.

If the wife leaves her husband voluntarily or by consent, or if her misconduct has materially induced the action on the part of the husband upon which she relies as justifying the separation, she will not be without fault on her part, within the meaning of the law. Johnson vs Johnson, 125 Ill. 510-515; Hoffman vs Hoffman, 316 Ill. 204-212.

It is clear from the testimony that the complainant voluntarily consented to the separation; she was perfectly willing for the mother of her husband to have the care of him while he was sick and unable to care for himself. Was the defendant financially able to pay the amount provided for in the decree? The record discloses that the

defendant was an extra man and worked three or four hours a day for the traction company in Rockford. That the defendant is not an able bodied man is uncontroverted. The defendant is in poor health and in the opinion of the doctors a chronic condition prevails which renders him unable to work all of the time. He is not only unable to work full time but the evidence disclosed that he works at irregular intervals, at short hours and earns but little money. The defendant during his illness contracted large hospital bills and doctor bills and it has only been through the financial assistance of his father that he has been able to meet his obligations in part. In a case where the evidence shows that a husband is unable to pay the amount provided for in the decree because of no fault of his own the decree should not have been rendered.

Furthermore during the trial the defendant offered to prove that the complainant had told him a number of times that she did not want to take care of him when he was sick; that she did not want to mend his clothing; that she did not want to do housekeeping and that she did not like domestic work. The court sustained an objection to an offer of such evidence. We think the court erred in refusing to admit it.

We are of the opinion therefore, that the complainant has failed to show that she has a good cause for living separate and apart from her husband; and that she has failed to establish the fact that such living apart was without fault on her part. We are likewise of the opinion that the defendant by reason of his financial condition and the state of his health is unable to comply with the decree and that the decree should not have been rendered against him. The decree is reversed and the cause remanded.

Decree reversed and cause remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the Opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15 th day of December in the year of our Lord one thousand nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: On DEC 23 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

he People of the State f Illinois, Defendant in Error, vs. ethel Robinson, Plaintiff in Error.

Appeal from the County Court of Bureau County.

243 I.A. 637

artlow, P. J.

Plaintiff in error, Bethel Robinson, was found guilty in he county court of Bureau county on the first count of an information arging the illegal possession of intoxicating liquor, on May 11, 26, and on the last four counts charging illegal sales on May 8, 9, and 11, 1926, and a writ of error has been prosecuted to review e judgment.

Plaintiff in error contends that the evidence does not pport the judgment. The evidence shows that plaintiff in error, for x or seven months prior to his arrest, had conducted a soft drink rlor in a dwelling house in Spring Valley. B. F. McClellan, who was carpenter living in Tiskilwa, in Bureau county, testified that he had en employed by the state's attorney to investigate violations of the phibition law. He testified that on March 14, 1926, at the place of siness of the plaintiff in error, he and another man bought two drinks moonshine whiskey at twenty-five cents per drink, which they drank the premises; that in his opinion the drinks served ~~were~~ was whiskey, t it was intoxicating, and contained more than one-half of one per t of alcohol by volume. He testified there was a colored girl oking in the place. He testified that on April 18, 1926, about ten 'lock P. M. he and another man bought whiskey at the place, having loholic content of about fifty per cent by volume.

Al Miller, another investigator employed by the state's

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ttorney, testified that he was in plaintiff in error's place about
ay 1, 1926, at which time plaintiff in error gave him a drink of whiskey
hich he called moonshine; that in his opinion the alcoholic content was
ell over one per cent by volume; that it contained about forty per cent
f alcohol by volume; that he was in the place about every day from
ay 1 to May 14, 1926, and on each occasion purchased moonshine whiskey
rom the plaintiff in error; that he saw colored and mulatto women in
here drinking whiskey out of the same pitcher from which he was served;
at he saw persons become intoxicated; that the intoxicating liquor
hich he purchased each day was all of the same kind and character. He
estified that on April 28, he met a colored man there by the name of
rank. He did not know his other name. He and Frank went to the plain-
ff in error's place on May 5. He saw liquor served to Frank on one
two occasions, he saw Frank drunk, and Frank got part of the liquor
plaintiff in error.

Plaintiff in error did not testify. Mabel Green, a colored
man who claimed to have been employed by plaintiff in error as a cook
d waitress, testified that she was in the place of business of plain-
ff in error all of the time from March 14, 1926, to May 15, 1926; that
e never saw any one served with liquor during that time; between
that
ober 29, 1925, and the date of the trial, no intoxicating liquor had
en served to any one in the place. She testified she was a cateress
left employment in Chicago where she was getting $30.00 per week and
t to work for plaintiff in error at $10.00 a week; that she had never
en anybody in Spring Valley drinking; that drunken people came into
intiff in error's place once or twice a week; that they had no glasses
the place except water glasses; that they served beer and other soft
nks; that they had no pitcher of any kind. The only other witness for
intiff in error testified that on May 15, when a search warrant was
ved on plaintiff in error, no liquor was found in his place.

The evidence was sufficient to establish beyond a reasonable
ubt the guilt of the plaintiff in error upon each count of the infor-

ation. Whether the law had been violated was a question of fact for he jury. The jury saw the witnesses and heard them testify and was n a better position than we are to determine what weight should be iven to the testimony of each.

In support of his motion for a new trial plaintiff in error led three affidavits. Plaintiff in error alleged in his affidavit hat at the trial he did not know a colored man named Frank; that nce the trial he had ascertained that the Frank referred to was a n commonly known as Alligator McKinney; that he did not know Miller, d never seen Miller before Miller went on the witness stand; that he d made inquiries to ascertain who Miller was, but could not find any e who knew him; that when Miller appeared as a witness he identified m as a person whom he had seen in the neighborhood of his place of siness with McKinney and Walter Davis; that he is informed that lter Davis will testify on a new trial that Davis knew that Miller s never in affiant's place; that he was unable to secure an affidavit om Miller because he did not know where Davis was, but that he could oduce him on the trial; that Miller, subsequent to the trial, and on ne 11, 1926, stated to McKinney and Walker that he had never been in ffiant's place; that at the trial he was surprised by the testimony McClellan whose name was not upon the information; that affiant ew his place of business had been closed on April 18 or 25, but was sure of the exact date; that since the trial he had made certain t on April 18, 1926, his place of business was closed and all his loyes were in Ottawa; that these facts had come to him since the ring, and he would be able to prove them on a new trial.

Frank McKinney in his affidavit alleged that he was well uainted with Miller, and knew that on May 8 and 9, Miller was not in intiff in error's place, but on those days, in company with affiant, ller was in Mendota and Princeton, Illinois; that any statement made Miller to the contrary was wrong; that affiant had never been in the e of business of plaintiff in error, nor been served with drinks

there; that he was in the compan of Miller at all times when Miller was in Spring Valley; that on July 11, 1926, in the city of Princeton, in company with Walker, they were told by Miller that Miller had been paid to get evidence to convict the plaintiff in error.

Mabel Green made affidavit that at the time she testified she could not recall on what Sunday in April, 1926, plaintiff in error's place had been closed, but that she knew he, in company with affiant, had been in Ottawa on Sunday during the latter part of April; that since the trial she had refreshed her memory and now knows that on April 18, 1926, the place was closed from noon until one o'clock of the following day.

Defendant in error filed the affidavit of Miller in which he alleged that on Sunday, July 11, 1926, he was at the Alexander Park east of Princeton, and had a conversation with McKinney; that no other person was present; that he did not in the presence of McKinney, or in the presence of any other person at said time and place, say that the testimony which he had given at the trial was untrue, or that it was a lie, or that he had so testified because he had been paid to get evidence against plaintiff in error, or that he had not been in the place of business of plaintiff in error at any time; that the trial of plaintiff in error was never mentioned by him, or McKinney, or Walker; that McKinney was not present at the trial of plaintiff in error; that Miller testified as a witness for the prosecution in the case against William Olive, and McKinney testified on behalf of Olive; that he had a conversation at the ball game with McKinney with reference to the Olive trial; that the substance of the conversation was that McKinney said to affiant: "Are you still around here," and Miller replied, "Yes, I am waiting for the next trial. I was surprised about your getting on the witness - stand and lying in Olive's case about me going to Mendota with you. You know I never went to Mendota with you, but only went to Arlington. So did Steel Arm Davis lie when he said that he wasn't in Spring Valley on April 28. You lied too when you said you never saw me in Olive's

place. You know you saw me there and that I bought you drinks in there;" that in reply to this McKinney said: "Well, you won anyhow. There ain't any use to go ahead and argue it now."

Section 1, Division 13, Chap. 28, of the statute provides that every person charged with treason, murder, or other felonious crimes, shall be furnished, previous to his arraignment, with a copy of the indictment and a list of the jurors or witnesses. In all other cases he shall, at his request, or at the request of his counsel, be furnished with a copy of the indictment and a list of jurors and witnesses. The statute does not require the names of witnesses to be placed upon the back of an indictment in a prosecution for a misdemeanor. People vs. Medruh, 226 Ill. App. 27; McDonald vs. People, 9 Ill. App. 357. Neither plaintiff in error nor his counsel made any request, at any time before the trial, or during the trial, to be furnished with a list of the witnesses. The defendant in a criminal case gives the right to be furnished with a list of witnesses where he fails to demand the same before or during the trial. Kelly vs. People, 92 Ill. 363; People vs. Viskniskki, 155 Ill. App. 292. Even in felony cases, it is within the sound discretion of the court to permit witnesses to testify whose names are not on the indictment. People vs. Steinhauer 178 Ill. 46. There was no error in permitting McClellan to testify.

Newly discovered evidence is not grounds for a new trial unless diligence was used to procure it at the trial. Williams vs. People, 164 Ill. 481; Spahn vs. People, 137 Ill. 538. Newly discovered evidence which is merely cumulative and impeaching, or which relates to matters of which the defendant must have had knowledge before the trial, but about which he then said nothing, is not grounds for a new trial. People vs. Johnson, 286 Ill. 108; People vs. Moeller, 260 Ill. 77; People vs. Hager, 249 Ill. 603; Lathrop vs. People, 197 Ill. 169. Here affidavits in support of a motion for a new trial set up merely cumulative facts, and not facts which are controlling and conclusive, the

tion is properly overruled. Springer vs. Schultz, 205 Ill. 144; yer vs. Mead, 83 Ill. 19; Metchur vs. Bernstein, 110 Ill. App. 484. stimony of an admission of the prosecuting witness in conflict with s testimony given on the trial is impeaching in its character and a w trial will not be granted to allow the presentation of such evidence. bin vs. People, 101 Ill. 121.

Plaintiff in error in his affidavit complains chiefly of the ct that McClellan was called as a witness, and that he remembered nce the trial that he was away from his place of business on April 18. has never been the practice to grant a new trial on the ground that witness could not remember his alibi until after the trial. Plaintiff error was not entitled to a new trial because McClellan testified as witness, and the remainder of his affidavit was not sufficient to title him to a new trial. The affidavit of McKinney was impeaching in s character. That part of his affidavit in which he denied that plain- ff in error had ever served any drinks in his place of business was mulative and a duplicate of the negative testimony of Mabel Green who d testified directly on that point. That part of the affidavit in ich he sought to impeach Miller by the conversation on July 11, 1926, s impeaching in its character, was not of a conclusive nature, and was ied by Miller. The court properly refused to grant the new trial.

Plaintiff in error insists that the imprisonment for a first fense authorized by the Prohibition Act, is imprisonment in some al place, which would be the county jail of Bureau county. Paragraph Chapter 23, of the statutes, provides that in all cases in which a rt is authorized by law to sentence male offenders above the age of teen years to jail, such court is authorized in its discretion, if sentence is for sixty days or more, to commit or sentence the endant to the Illinois State Farm. The sentance was in accord with s statute and was correct.

On the hearing of the motion for a new trial, the court per- ted the prosecution to introduce in evidence the record of a prior

conviction of plaintiff in error for a violation of the Prohibition Act. The objection is that the prior conviction was not alleged in the information and its admission was error. The record of the prior conviction was not introduced on the trial, but was only considered by the court in fixing the punishment. Section 33, of the Prohibition Act provides the penalty of a fine of not less than $100 nor more than $1000, or imprisonment for not less than sixty days, nor more than six months for the illegal possession of intoxicating liquor. The illegal sale of intoxicating liquor is punishable the same as the illegal possession except that the court may impose both fine and imprisonment. The court may consider the moral character of the accused, and whether or not he has been convicted on former occasions in determining the punishment to be imposed, and evidence may be heard for this purpose. The court may take into consideration such matters as may be in aggravation or mitigation of the offense although they are not admissable as to the guilt or innocence of the defendant. 16 Corpus Juris 1297. There was no error in considering the prior conviction in determining the sentence to be imposed.

The dates on which plaintiff in error was charged in the information with having sold liquor are not laid under a videlicit and he contends that the State was required to prove the dates as alleged. Miller testified he purchased liquor on each of the days charged in the information. Plaintiff in error relies upon affidavits filed after the trial which he claims prove that plaintiff in error was not in his place of business on two of the days charged, therefore two of the dates charged in the information are not proven. If this contention is correct, the affidavits filed after the trial should have more weight than the evidence presented on the trial. This is not the case, the evidence sustains the conviction, and there was no error in this respect.

Plaintiff in error contends that the Prohibition Act does not prohibit the possession of liquor in a private dwelling, but that the second instruction directed the jury to find plaintiff in error guilty

regardless of whether the liquor was possessed in a private dwelling or not. The instruction does not so state and is not capable of this interpretation. The evidence does not show that the liquor was possessed in a private dwelling. The witnesses testified that the liquor was in plaintiff in error's place of business. They testified that he went out of his place of business and returned with the liquor. He then possessed the liquor in his place of business. There is no evidence that plaintiff in error possessed liquor in his private dwelling for his own use, but there is evidence that he possessed it and sold it in his place of business.

The judgment was that plaintiff in error pay a fine of $100 on each of the five counts, and be imprisoned in the Illinois State Farm at Vandalia for a term of six months. The statute provides only fine or imprisonment for the illegal possession of intoxicating liquor, and provides for a fine and imprisonment or both for the illegal sale of intoxicating liquor. The court properly imposed a fine under each count, and might have imposed six months imprisonment on each or all of the last four counts, but the judgment does not specify on which count the imprisonment was imposed and in this respect is erroneous. The judgment will be affirmed in all respects, except that it will be reversed with directions to specify on which one of the last four counts the imprisonment was imposed.

Reversed and remanded with directions.

TATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
d for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
ove entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 23d day of Dec., in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: On DEC 23 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Walter B. Wells,
Appellee,

vs.

Edward Baker,
Appellant.

Appeal from the Circuit Court of La Salle County.

243 I.A. 637

Partlow, P. J.

Appellee, Walter B. Wells, obtained a judgment for $5000.00 in the circuit court of La Salle county, against appellant, Edward Baker, as damages for an automobile collision, and an appeal has been prosecuted to this court.

On December 30, 1923, about 11 o'clock P. M. Louis Hersheway drove a Ford touring car south on the Bloomington road between Ottawa and Streator, Illinois, The concrete pavement was 18 feet wide with a black line down the center. There were dirt shoulders on each side about three or four feet wide, and outside of each shoulder was a ditch from one to two feet deep. It was misting rain and there was some fog, making it difficult to see. When he was just north of Grand Ridge, he ran out of gasoline. There is a conflict in the evidence as to where he stopped his car. The evidence on behalf of appellee is that his right wheels were a few inches off of the west side of the pavement.

Appellee, Walter B. Wells, with his wife and three children, left a theatre in Ottawa about 10:30 o'clock P. M. for his home in Streator, in a Chevrolet, five passenger touring car. As he approached Grand Ridge he observed Hersheway in the road waving his hat. Appellee stopped within 8 or 10 feet of the Hersheway car. There is another conflict in the evidence as to where appellee's car was standing. Appellee and his son testified it was almost entirely off of the pavement on the dirt shoulder to the west. Appellant testified it was entirely on the west half of the pavement. Fred Kohrt testified that

Appeal from the Circuit Court of
La Salle County.

24314. 637

Appellee, Walter B. Wells, obtained a judgment for $8000.00 in the circuit court of La Salle county, against appellant, Edward [illegible], for damages for an automobile collision, and an appeal has been prosecuted to this court.

On December 30, 1923, about 11 o'clock P. M. Louis Hornbeck was driving a Ford touring car south on the Bloomington road between Ottawa and Streator, Illinois. The concrete pavement was 18 feet wide with [illegible] down the center. There were dirt shoulders on each side [illegible] three or four feet wide, and sloping to [illegible] ran a [illegible] two feet deep. It was [illegible] dark, making it difficult to see. [illegible] Ridge, in the act of passing. There is a conflict in the [illegible] as to where he stopped his car. The evidence on behalf of the [illegible] is that his right wheels were a few inches [illegible] of the pavement.

Appellee, Walter B. Wells, with his wife [illegible] theatre in Ottawa about 10:30 o'clock P. M. for his home in Streator in a Chevrolet, five passenger touring car. As he approached Ridge he observed Hornbeck in the road waving his hat. Appellee [illegible] within 8 or 10 feet of the Hornbeck car. There is another [illegible] is the evidence as to where appellee's car was [illegible] like his car had [illegible] it was right [illegible] of the dirt shoulder to the west. Appellant testified it was [illegible] on the west half of the pavement. [illegible] that [illegible]

the left rear wheel was two or three feet west of the middle line of the cement road. Hersheway testified that when the Wells' car first stopped, it was all on the pavement, and they pushed it to the southwest until the right front wheel was a foot off of the pavement, and the right rear wheel was a foot on the pavement.

Appellee attached his trouble light to the dash. The wire was 8 or 10 feet long. Appellee, Hersheway, and appellee's son went behind the car. The son stood near the ditch on the west side of the car and held the light so as to enable appellee, who was standing directly behind the cap on the gas tank, to siphon out some gas. Hersheway was standing at the left of the son. The opening in the gas tank was on the west side of the rear end of the car. Appellee had a red tail light on the left rear fender and he testified that it was lighted. He also testified that there was a beacon or spotlight on the left rear fender, and this was also lighted.

Appellant was driving south in a Nash car from Ottawa to Streator. He testified he did not see the Wells' car until he was 50 or 60 feet from it. As soon as he saw it he put on his brakes and turned towards the east to avoid appellee's car. At that moment a Ford roadster, driven by Fred Kohrt, approached from the south. Kohrt drove to the east so that his two right wheels were on the east shoulder and his left sheels were on the pavement. It is claimed by appellant that the front bumper of the Baker car struck the left side of the Kohrt car, and that the right side of the Baker car was thrown against the rear end of the Wells' car and against the three men, and the Wells' car was driven south until it struck the Hersheway car. It is claimed by appellee that appellant's car struck appellee's car and it was driven forward so that the front struck the right rear of the Hersheway car, and that the Kohrt car was struck by appellant's car as it glanced off of appellee's car. The Kohrt car was turned over on the side of the road about 12 to 15 feet north of appellee's car. Appellant's car skidded south a short distance and

stopped with its four wheels in or near the ditch facing east. It is claimed by appellant that if appellee's tail light was burning that appellee or his son, or Hersheway, or all of them, were standing in front of it so appellant could not see it as he approached from the north.

The declaration consisted of one original count and four additional counts. The first three counts charged general negligence, a failure to keep a proper lookout, and excessive speed. The last count charged that appellant wrongfully, willfully and wantonly ran, managed, operated and controlled his said automobile so that it struck and collided with appellee as he was lawfully upon said public highway.

As ground for reversal, it is urged that the last count did not state a cause of action for a wilful and wanton injury; that the evidence does not sustain a wilful and wanton injury; that the third and fifth instructions on behalf of appellee were erroneous; that the amount of the verdict can only be sustained on the ground that the injury was wilful and wanton.

The last count was not tested by a demurrer, but appellant filed the general issue thereto. For this reason the sufficiency of that count is not before this court for review unless the count does not state a cause of action and will not sustain a verdict. City of Chicago vs. Lonergan, 196 Ill. 518; Sargent Co. vs. Baublis, 215 Ill. 28.

In order to make a person liable for a wilful or wanton injury, it is necessary for the evidence to show, that the injury was intentional and wittingly committed, or to prove such facts and circumstances from which it appears that the injury was intentionally committed, or that it was committed with such gross disregard for the rights of others as to evidence a willingness to commit an injury. It is not sufficient to characterize the act itself as wilful. It has been generally held that a wilful injury is not charged by an allegation

that the act was committed recklessly, wantonly, pruposely, wrongfully, and unlawfully. Jeneary vs. Chicago and I. Traction Co., 306 Ill. 392; Bernier vs. Illinois Central, 296 Ill. 264; Walldren vs. Krug, 291 Ill. 472; Chicago City Ry.Co. vs. Jordan, 215 Ill. 397; C. B. & Q. Ry. Co. vs. Johnson, 103 Ill. 512; Harris vs. Piggly Wiggly Stores, 236 Ill. App. 392; Burns vs. Chicago & Alton Railway Co., 229 Ill. App. 170; 29 Cyc 574.

When the Wells and Hersheway cars stopped, they obstructed the pavement. The average car is from 68 to 70 inches wide. Even if the right wheels of each car were 18 inches off of the pavement, which is the greatest distance testified to by any witness for appellee, these cars would form an obstruction of four feet and two inches on the west half of the pavement, which was only nine feet wide, therefore, a car going south, in attempting to pass them on the east, would be compelled to cross onto the east half of the pavement. The evidence in fact shows that the two cars occupied even more space on the west half of the pavement than above stated, so of necessity made a greater obstruction to the west half. It was misting and was very dark and foggy, to such an extent that the view was obstructed. Appellant testified that as he approached the scene of the accident he was driving about 18 or 20 miles per hour. Kohrt testified that appellant's car was going 20 to 25 miles per hour when he first saw appellant and was about 80 feet from Kohrt. There is some evidence to the effect that appellant was traveling at a greater rate of speed just north of the place of the collision but we do not think the evidence establishes this fact. Appellant testified that he saw no light on the Wells' car. When he first saw it he immediately put on his brakes, turned to the east and when the collision occurred his car was going about 10 miles per hour. He would have passed the Wells' car entirely if it had not been that the Kohrt's car obstructed the road so he could not pass. Appellant's car was stopped within a short distance after the collision, and therefore, it could not have been going very fast. The Wells' car when it struck the

heway car bent a fender which was straightened by hand. The damage he Wells' car was $127.66. The injury to the Baker car was a very ht amount. Under all the facts appearing in evidence we do not k they show a wanton or wilful injury. There was no apparent inten- on the part of appellant to injure appellee, and the accident was attended with such gross disregard for the rights of appellee as to ence a willingness to commit the injury. On the contrary the evidence s that appellant attempted to avoid the collision and did what he l not to injure appellee or his property.

The amount of the verdict can only be sustained on the ground wanton and wilful injury. Appellee testified that his left thigh right hip were bruised; his back hurt; his right knee swelled to its size and continued in that condition until after he left the tal. He had pain at the end of his spine when he walked. He never crutches after he left the hospital but he had used a cane. He could o to sleep unless he was tired. Under certain conditions he got or faint. Before the accident he sold cottage cheese and made eries in his car. He did not try to go to work for three or four s after the accident because he was not able to drive his car. He worked only three or four weeks because the suffering was too much at there was in it. He played in an orchestra before the accident sumed that work after the accident and kept it up for 18 months. in the hospital two weeks and four days.

Appellee called three doctors to testify as experts. They stified they took no X-ray photographs because they knew there was ury to any of the bones. Dr. Roberts testified that he examined ee ten days before the trial and found an atrophy on the right side pelvis in the region of the sacroiliac joint; that there was a ng on the left side and an atrophy on the right side, and that the ion was permanent. On cross-examination he testified that the ence between the two sides was small. He denied that he had stated

on direct examination that the left side was swollen and he said that what he meant was that the left side seemed larger than the right because the right side was atrophied, and that appellee limped.

Dr. Clune testified that he only examined appellee the morning of the trial. He found an atrophy of the muscles of the right buttock and a restricted motion of the pelvis. The flexion was diminished. On cross-examination he testified that appellee was in his office about 20 minutes and that he finished the examination about one-half hour before he was called to the stand. He measured both legs immediately below the fold of the buttocks. He could not recall what either leg measured, but that the right leg was one-fourth of an inch smaller than the left; that it was no unusual thing to find this difference in the size of the legs.

Dr. Hathaway testified he examined appellee four times. The first time was in September, 1925. He examined his heart, his pulse and his temperature, found considerable swelling in the region of the pelvic bone at the junction of the ilium with the spinal column, that he was of the opinion that there was an injury to the hip bone. The second time he examined appellee he found the same condition, and that appellee walked with a side motion, not a natural gait. The third time he found the conditions the same, except that the swelling had gone down a little/ the last time just before the trial he found the swelling had subsided, and there was a slight atrophy in place of the swelling and it would be permanent; that the only treatment he prescribed when appellee called in September was that he told appellee to go home and go to bed and that the other times he did not prescribe anything. When he first examined appellee he found the swelling in the middle or small of the back. He believed the ligaments were injured. This opinion was based largely on what appellee said about having pain and the manner in which he walked.

On the night of the accident, before appellee was removed to the hospital in Streator, Dr. Smith, of Grand Ridge, was called and made

examination. He testified that appellee was screaming and making considerable noise, and the people were greatly excited. He could not tell how much pain appellee was suffering. His reflexes were all right. His heart action was good and there was no shock. He called Dr. Howe, of Streator, and had appellee removed to the hospital. He thought appellee was perfectly able to make the trip and that it was not necessary for the doctor to go along. There was no evidence of a cutting off of the nerve supply. From the superficial examination he made he was not able to discover any external evidence of injury. He saw appellee a few days later in the hospital and there was evidence of a contusion and injury, discoloration on the right side of the lumbar region. They had an X-ray taken and did not find any injury to the vertebra or bony structure. Appellee complained of pain in his back and they examined the eyes, patella and various reflexes. They applied pressure to the back and there seemed to be pain on the right side and very little on the left. How much pain appellee had the doctor could not determine, for the reason that if he did not use too deep a pressure and appellee had his mind diverted, they did not get much pain on either side, and if they asked him if it hurt he would say yes. He testified he could not see any cause for the continuous complaint, and the question in his mind was whether he was right or wrong in the diagnosis; whether the man was as badly hurt as he let on to be.

Dr. Howe was appellee's family physician and saw him in the hospital about midnight on the night of the injury. Appellee was complaining of a great deal of pain. One of his arms was bruised, one knee was skinned, and he complained of considerable pain over his right hip. He was sore all over but his hip seemed to be the sorest spot. The doctor could not find any evidence of an injury to the hip except the soreness. Appellee was in the hospital from seventeen to twenty days. They took an X-ray, made a blood count, and an analysis of the urine, but found nothing serious. After appellee left the hospital he was in the doctor's office a few times. The doctor testified that in his opinion appellee

no permanent injury. He was then asked whether in his opinion
ellee was shamming and he stated that in his opinion he was. Appellee
not have any blow at the base of the back bone. A lump was just
ve the hip bone. The injury was not over the small of the back and
the right of the back bone. At first appellee did not complain much
ut the knee but said he was suffering pain in the back.

Under this evidence we do not think appellee was injured to
h an extent that he was entitled to recover a judgment of the amount
this verdict. It was clearly excessive and contrary to the manifest
ght of the evidence.

The third instruction on behalf of appellee attempted to define
ful or wanton misconduct, and told the jury that if the defendant in
ving his car was guilty of wilful or wanton misconduct and that the
intiff was injured by reason thereof, then it made no difference
ther the defendant was or was not in the exercise of due and ordinary
for his own safety, and in such case plaintiff would be liable to
ndant for damages for any injury sustained. Even if this instruction
otherwise correct the last part of it was erroneous because it trans-
s the words plaintiff and defendant, and told the jury that it made
iffernence whether the defendant was or was not in the exercise of due
and caution, that the plaintiff would be liable to the defendant for
ges for any injury received.

The fifth instruction on behalf of appellee told the jury that
ney found that the defendant, at and immediately prior to the accident,
ted his automobile in a wanton, wilful and reckless disregard of the
s of others, and that the plaintiff thereby suffered actual damages,
ury might assess against the defendant exemplary or punitive damages.
der for appellee to recover under the wanton count it was necessary
appellant operate his automobile in wanton, wilful, and reckless dis-
d, not necessarily of the rights of any or all other persons, but of
ights of appellee. Under the instruction, if the jury believe that
lant recklessly disregarded the rights of Hersheway or of Kohrt,

ey were told to punish appellant and reward appellee, regardless of ether the conduct of appellant was or was not the proximate cause of e injury to appellee. The instruction was erroneous and should not ve been given.

The fourteenth, fifteenth and sixteenth refused instructions behalf of appellant are with reference to lights on automobiles after rk. They all stated correct rules of law and at least one of them ould have been given. All were refused and no other instruction on is point was given.

Complaint is made that counsel for appellee asked improper estions with reference to whether there was insurance; that he made proper remarks in his argument, charged appellant with being an out- w and a wild man, asked him how many accidents he had had, and if he s not a reckless driver. It will not be necessary to consider these ints in detail. We have examined each and find there is much merit the contention of appellant in these regards. We mention them so ey may be avoided upon another trial.

For the errors indicated the judgment will be reversed and e cause remanded.

Reversed and remanded.

TATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in nd for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, o hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the bove entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 23d day of Dec. in the year of our Lord one thousand nine hundred and twenty-six

Justus L. Johnson

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: On DEC 28 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois, ex rel, Lisetta Bird

Appellee,

vs.

Charles Tyler, Jr.,

Appellant.

Appeal from the County Court of Putnam County.

243 I.A. 637

Partlow, P. J.

Appellant, Charles Tyler, Jr., was found guilty by a jury in the county court of Putnam county, upon a complaint under the Bastardy Act, charging him with being the father of a child born to Lisetta Bird, on May 16, 1926, and an appeal has been prosecuted to this court.

The relatrix testified that she had never had intercourse with appellant but once; that the act took place on a country road a few miles from Granville, Illinois, in an automobile, on the night of August 19, 1925, or August 20, 1925, and that she had never had intercourse with any other man. She was the only witness for appellee. Appellant denied that he had ever had intercourse with her, or that he had been with her on either of the dates specified. He testified that he was at another place on each of the dates, and other witnesses testified to having been with him at other places on each of said dates. As this case will have to be reversed because of erroneous instructions given on behalf of appellee, we will not discuss the facts in evidence.

The second instruction told the jury that while it was true that the People must prove their case by the preponderance of the evidence, this must not necessarily mean that they must so prove by the greater number of witnesses, but it meant that in considering and weighing all of the evidence, that if the most convincing evidence was credible and believed by the jury, was on the side of the People without regard to the number of witnesses, then the People had made out their

Appeal from the County Court of
Putnam County.

2431.A. 637

ase. The complaint against this instruction is that it omits the lement of the number of witnesses. It is a well known rule of law hat the number of witnesses is one of the elements to be taken into onsideration in determining the preponderance of the evidence. Gage s. Eddy, 179 Ill. 492; Chicago Union Traction Company vs. Hampe, 228 ll. 346. In Elgin, Joliet & Eastern Railway Company vs. Lawlor, 229 ll. 621, it was held that an instruction which does not tell the jury o disregard the element of the number of witnesses, but which erely omits that element from the others recited in the instruction, fter stating that the preponderance is not to be determined by the umber of witnesses alone, is not ground for reversal where the ele- ent of the number of witnesses is not important, or where the omission s supplied in other instructions. The omission of the element of the umber of witnesses was not supplied by any other instruction and this lement was of importance in determining the preponderance of the vidence. The effect of the instruction was to tell the jury to disre- ard this element which was erroneous.

The third instruction told the jury, as a matter of law, hat the day upon which the prosecuting witness became pregnant was o more material in this class of cases than in any other, as the q uestion to be determined was whether the defendant was the father of he child, and it matters not whether he became so on one day or nother, and although the jury might believe that the prosecuting itness was mistaken as to the day on which the defendant had sexual ntercourse with her, yet, if the jury believe from the evidence hat the defendant was the father of the child, they should find him uilty. In Matteson vs. The People, 122 Ill. App. 66, this court held hat, under the facts presented in that case, an instruction similar o the third was erroneous. Ordinarily in this class of cases where he evidence shows intercourse on various occasions, an instruction f this kind might not be improper, but in this case the relatrix estified that there had been but one act of intercourse and that it

took place at a specific time and place, and at no other time or place. The appellant was the father of the child as the result of this one act of intercourse or he was not guilty of the charge. It was erroneou to instruct the jury that this fact was not material. It has also been repeatedly held that it is reversible error to give an instruction authorizing the jury to find a certain fact when there is no evidence upon which such a finding could be made. Cullen vs. Higgins, 216 Ill. 78; Cox vs. Cleveland, Cincinnati, Chicago & St. Louis R. R. Company, 151 Ill. App. 473.

The fourth instruction told the jury that the object of the bastardy law is not to punish the defendant nor to reward the mother of the child, but the object is to provide for the maintenance, education and support of the child and to prevent it from becoming a public charge. In People vs. Norbants, 193 Ill. App. 431, it was held that an instruction of this kind was harmless error, while in People vs. Welch, 143 Ill. App. 191, it was held that such an instruction was erroneous in submitting to the jury an issue which was not then being tried by them; that the sole and only question for the jury to determin was whether or not the defendant in the trial court was the father of the child. Both cases held that the instruction was erroneous, one holds the error was harmless, but under both the instruction should not have been given.

The ninth instruction told the jury that before a defendant can avail himself of the defense of an alibi, the proof must cover the whole time during which conception might have taken place, so as to render it impossible or improbable that defendant could have committed the act, and unless the evidence does so show, the defense is not available to the defendant. The instruction is inaccurate and misleading under the facts in evidence. It is not confined to this defendant but is applicable to any defendant in any bastardy case. It is not limited to the facts and circumstances in evidence in this case, nor is it confined to the usual period of gestation. Under the testimony

of the relatrix, conception could not have taken place as a result of intercourse with appellee at any other time or date than August 19 or August 20, and yet the instruction tells the jury that a defendant cannot avail himself of the defense unless the proof covers the whole time during which conception might have taken place regardless of the evidence and facts and circumstances surrounding the case. There might be facts and circumstances under which this instruction would be good but it was not good in this case.

The tenth instruction told the jury that if they believed from the evidence that the defendant had sexual intercourse with the complaining witness during the month of August, 1925, then they were at liberty to find him guilty, if they believed from the preponderance of the evidence that he was the father of the child. This instruction is not based upon the evidence. It tells the jury to find appellant guilty upon a state of facts not testified to by the prosecuting witness.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 28th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois.

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: On DEC 28 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,
Defendant in Error,
vs.
John Friedel,
Plaintiff in Error.

Error to the County Court of Lake County.

243 I.A. 637

Partlow, P. J.

Plaintiff in error, John Friedel, was found guilty by a jury in the county court of Lake county, upon the first count of an information charging the illegal possession of intoxicating liquor, and he has prosecuted a writ of error from this court to review the judgment.

Plaintiff in error filed a sworn petition to suppress all of the evidence obtained under a search warrant. The search warrant and the affidavit upon which it was based were attached to the petition and made a part of it. The court denied the prayer of the petition and this ruling is assigned as error. Neither the sworn petition to suppress the evidence, the search warrant, the affidavit on which it was based, nor the ruling of the court thereon, appear in the bill of exceptions. In People vs. Levin, 318 Ill. 227, it was held that where the petition, motions, affidavits and ruling of the court do not appear in the bill of exceptions, but are only in the common law record, that the question for review is not properly before the court and cannot be considered. The same rule is announced in People vs. Braidman, 323 Ill. 37; People vs. Hart, 323 Ill. 61; People vs. Campbell, 323 Ill. 129. Under these authorities the motion to suppress is not properly before this court for review.

The motion of plaintiff in error for a bill of particulars was denied and this ruling has been assigned as error. Whether a bill

The People of the State
of Illinois,

Defendant in Error,

vs.

Plaintiff in Error.

Error to the County Court of
Lake County.

2431.A. 637

of particulars shall be ordered is a question which rests within the sound discretion of the trial court and such discretion will not be reviewed unless it appears that the discretion has been abused. The evidence in this case shows that the plaintiff in error was present at the time the liquor in question was seized. He had knowledge of all of the facts relative to the charge upon which he was arrested, and he was not entitled to a bill of particulars.

Complaint is made of the first and second instructions given on behalf of defendant in error. The first instruction is in the language of Section 3 of the Prohibition Act. Our attention is not called to any cases in which it has been held that the giving of an instruction of this kind is erroneous. The second instruction is in the language of Section 40 of the Prohibition Act. Defendant in error insists that this last instruction was approved in People vs. Beck, 305 Ill. 593. In the case of People vs. Mizer, (General Number 7538, April Term, 1926) this court had occasion to consider this identical instruction, together with the authorities urged in support of it. We there said: "This instruction is substantially in the language of Section 40 of the Prohibition Act, and it is claimed by the defendant in error that a similar instruction was approved in People vs. Beck, 305 Ill. 593. In that case an instruction quite similar to this one was under consideration in connection with Section 40 of the Prohibition Act, and it was there held that the provisions of Section 40 were constitutional, and were within the power of the legislature to pass, but it was not held that the giving of an instruction of this kind was proper under all circumstances. In the later case of People vs. Tate, 316 Ill. 52, this question was again before the court. The instruction in that case was, that the posession of intoxicating liquor by any one is prima facie evidence that such person keeps and possesses said liquor for the purpose of bartering and selling the same. The language of these instructions is not identical. The instruction now before us is that the possession of liquors by any person not legally permitted under the law to possess, shall be prima facie evidence, etc., while

the instruction in the Tate case related to any person possessing intoxicating liquor, whether lawful or otherwise. For this reason it might be urged that the Tate case is not authority for holding that the instruction given was improper, but on page 59 in that opinion the court held that when a defendant goes to trial and introduces evidence disputing the facts charged against him, it is then a question whether the evidence establishes a case against him beyond a reasonable doubt, and where there is such a contest in the evidence, there should be no instruction given as to what constitutes a prima facie case." In the case at bar the plaintiff in error disputed the facts charged against him as to the illegal possession of intoxicating liquor. Under the authorities cited the second instruction was erroneous and should not have been given.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 28th day of Dec. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On DEC 28 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

ter Haag,
Appellant,

vs.

rge Nimmo,
Appellee.

Appeal from the Circuit Court of Livingston County.

243 I.A. 638

rtlow, P. J.

Appellant, Walter Haag, began suit in the circuit court of vingston county against appellee, George Nimmo, to recover damages sulting from an automobile collision. There was a trial by jury and e jury was unable to agree upon a verdict. A stipulation was entered to which provided that the evidence on the former trial should be itten up and submitted to the trial court for decision without a jury. e court found for appellee, a judgment was entered in accord with the nding, and an appeal has been prosecuted to this court.

As grounds for reversal it is urged that appellant proved s case as alleged in the first three counts of his declaration; that e court was in error in rendering judgment against him; that the dgment is contrary to the law and the evidence.

The first count of the declaration charged that appellee, by s servant, so carelessly operated an automobile on the public high- y as to cause the same to collide with an automobile which appellant s driving along said highway. The second count charged general gligence, and that the road was improved with a concrete pavement hich was covered with snow and sleet. The third count charged that ppellee, by his servant, did not turn to the right of the center of he beaten track on said highway so as to pass the automobile of ppellant, and negligently collided with the automobile of appellant hich was on the right side of the beaten track.

The evidence shows that appellant lived on a farm near

Appeal from the Circuit Court of
Livingston County.

2431.A. 638

Cullom, Illinois, On the morning of December 30, 1924, about seven o'clock, he started from his home for Peoria. He was driving a Buick car which weighed about 2900 pounds, and which was equipped with a winter top. His wife was with him in the front seat and her mother, Mrs. Peter Faber, and her sister, Susie Faber, were in the back seat. They drove south to Chatsworth and then turned west on Route Number 8, which had a concrete pavement 18 feet wide. The morning was cold and there was a heavy fog. The pavement was covered with sleet and ice, which had accumulated from the sleet of December 18 of that year, and which varied in depth from one to three inches. A light snow had falle the previous night. The traffic had cut two ruts or paths in the ice and snow. There is a conflict in the evidence as to where these paths were located. The evidence on behalf of appellant is that they were near the center, or a little north of the center of the concrete pave- ment, while the evidence on behalf of appellee is that they were on the south side of the concrete pavement.

The agent of appellee, George Armstrong, was driving a Ford touring car. He started to get the car ready at seven o'clock at appellee's residence which was about one-half mile north and west of the place of the accident. He had considerable trouble in cranking the Ford for the reason that it had stood in the barnyard the night before. He got it started about twenty minutes to seven o'clock. He had chains on the rear wheels, and he testified that before starting he turned on the dimmers and spotlight. He drove south a short distance to Route , and thence east to the place of the accident.

The cars met about eight o'clock, one mile west of the city of Fairbury. Appellant testified he had his lights on and was driving about 25 miles an hour in the beaten tracks. When he first saw the Ford it was about a block away, coming towards him from 25 to 30 miles per hour, in the same beaten tracks; that he turned to the right, with both of his south wheels in the north beaten track, and slowed down; that the Ford did not turn out; that appellant turned further to the

ight, and when he was 25 or 30 feet from the Ford, he was entirely ut of the beaten tracks, and was on the north side of the pavement; hat just before the collision, the Ford attempted to turn to the right, ent across the beaten tracks, crashed into the Buick, striking its outh side with great force at about the junction of the rear door and he fender.

Armstrong testified that he had traveled 85 to 90 rods east the hard road before the accident occurred. His motor was not work-g very well and it had to be warmed up. He did not stop at any ace from the time of leaving appellee's home until the accident. He stified that he was traveling at approximately 15 miles per hour; at when he first saw the Buick it was about 100 feet a way, did not ve any lights on, was traveling about 40 miles per hour, and that both rs were in the beaten tracks. He testified that as soon as he saw the ick, he shut off the gas and turned to the right; that his north eels, after making the turn, went into the south rut of the beaten th, and his south wheels were off of the cement on the shoulder of the ad; that the Buick made an attempt to turn to the right, and the ont wheels of the Buick got out of the ruts, but the back wheels were equipped with chains, and skidded along in the ruts about 30 feet a sidewise position, and that the back end of the Buick sideswiped Ford about the median line of the radiator. He first said he was veling 15 miles per hour at the time of the accident, later said was going not more than 10 miles per hour, and that he could stop hin 30 feet; that the Ford when struck ran back straight west bably the length of the car. There is evidence tending to show t the left front wheel of the Ford came off of the spindle and ned the front of the Ford ~~came off~~ car slightly to the north. Arm-ong testified that when he got out of the Ford he found that the t front spindle of the Ford was on the south edge of the cement, t the Buick was to the west of the Ford, and was facing in a south-terly direction across the center of the cement highway.

Prior to the time of the accident, for a period of two years,

Armstrong had been an inmate of the Illinois State Reformatory, serving a sentence for forgery. He had only been released a short time and had been working for Nimmo about ten days.

Both cars were badly damaged. The Buick had marks on the left side starting at the front door and extending backwards. The left running board and fender were torn off, the left hind wheel was broken, the rim was bent into a half moon, the propeller shaft was pulled off, the glass of the top was broken, and the left side of the top was torn. After the accident there was a Ford rim on the rear spring of the Buick, and the weight of the car was on this rim so that it could not be pulled out. Mrs. Haag suffered a broken arm and other injuries, and the evidence showed that appellant's damages, including doctor, hospital, servant's bill, and repairs of the automobile, amounted to $882.89.

Armstrong testified that after the collision he had a conversation with appellant and asked him whether or not he could see him, and appellant said no. Appellant testified that immediately after the accident he had a conversation with Armstrong and said to him: "You are driving pretty fast this morning, aren't you", and Armstrong replied "that his accelerator was stuck". Armstrong further said that in the conversation with appellant he said to appellant "what the hell's the matter with you - can't you see", and appellant replied "no", and Armstrong said "you had better get a pair of spectacles then."

Louis and Clyde Kaisner, 16 and 14 years of age respectively, lived about a mile south of appellee on the north and south road. They were going to Fairbury in a wagon. They drove to the south road and started east. They testified that before they reached the scene of the accident they saw the Ford standing in the road. When they got within 25 feet of it, it started up and was smoking badly. They next saw it at the place of the collision. They testified that Billy Haag, Armstrong, and the three women were there when they arrived. They heard some talk about pushing the cars off of the road, and that Clyde Kaisner, Haag, and Armstrong pushed the Ford, which was in the

center of the highway facing northeast, about a car length to the southwest, and that Armstrong then left to get help, and they did not see him afterward. Louis Kaisner testified that when they first arrive they could have driven between the Ford and the Buick, and Clyde testified that they pulled their wagon to the south on the shoulder, went around the Ford and stopped; that they did not need to go clear off of the cement to go around the Ford. They further testified that while walking home from Fairbury some time after the accident, they met appellee who asked them if they had pushed the cars off of the road and they replied that they pushed the Ford off, and the Buick was slid over a little; that he told them they should say they never pushed the cars, never touched them, and did not know what kind of cars they were; that they were excited; that he told them not to tell this; that there was going to be a law-suit about it.

Armstrong denied that the Kaisner boys came up before he left. He said he never saw them that morning but that as he was going back to appellee's home on foot, he heard a wagon coming down the road in the direction of the Kaisner house. He denied that the Ford was pushed off of the road.

Ray Guthrie, a colored teamster, lived in Fairbury and was hauling coal from a mine west of Fairbury. He testified that he was on his wagon going to the coal shaft at about ten minutes after seven o'clock. He did not see the collision. It was foggy and he could not see more than 13 yards; that the Buick passed him about 500 yards east of the place of the collision, it was going 40 miles per hour, and was traveling in the beaten path. He did not see any lights on the Buick when it passed. When he reached the scene of the accident, the front wheels of the Buick were on the south side of the beaten tracks and the rear wheels were in the beaten tracks. It was in the middle of the road headed southwest. The Ford was on the south shoulder headed almost due east, and it was about seven yards from the Buick. The Buick was east of the Ford. He stopped his team seven yards from the Buick, and helped pull the Buick back; that he saw the Kaisner

boys drive up after he arrived but he did not see Armstrong. Nothing was done with the Ford after he arrived. They pulled the Buick north to the shoulder of the road. The head end of the Buick was southeast and they moved it off of the pavement. The Buick wheels were on the south edge of the pavement; that they pushed it north instead of south because the traffic had to get by, and because it was closer to go to the north side than it was to the south side.

William Nimmo, a brother of appellee, testified that he lived about 180 rods east of the accident; that while he was feeding his hogs that morning near the road he saw a car going west, that it was the only car that went west, and it was traveling about 40 miles per hour; that shortly after it passed he heard of the collision, and went to the scene of the accident with his car and took the injured parties to the hospital; that when he arrived at the scene of the accident that the Ford was on the south side of the road facing slightly northeast. The Buick was a little northwest of it facing southeast, and the front wheels were on the pavement and the back wheels were on the shoulder. The Ford was a rod and a half east of the Buick. On the way to town he asked appellant how the accident happened and who was to blame, and appellant said "I guess you would call it an unavoidable accident. I didn't see him and I don't think the other fellow saw me. I pulled out but I didn't pull soon enough - didn't get the hind end out of the way." He testified that they got to the doctor's office at ten minutes of eight o'clock.

While there are other items of evidence which might be mentioned in this connection, we have set forth the principal facts which were brought out upon the trial. The question is whether or not this evidence was sufficient to sustain the judgment that was rendered by the trial court.

The burden was upon appellant to prove that he was in the exercise of due care, and that appellee was guilty of the negligence charged in the declaration. It is conceded that the morning was cold and that a fog obstructed the view. Some of the witnesses testified

that they could only see 75 or 100 feet. Appellant testified he saw appellee's car a block away. How far this was in feet is not shown. Armstrong testified he did not see appellant's car until he was about 100 feet from it. The Ford had the dimmers lighted and carried a spotlight. Several witnesses testified that appellant had no light, but we think the preponderance of the evidence is to the contrary. There is also a conflict in the evidence as to the rate of speed of the two cars. Three witnesses testified that appellant was traveling 40 miles per hour, while his evidence is that he was traveling 25 miles per hour. Armstrong said the Ford was going 15 miles per hour and appellant testified it was going 25 to 30 miles per hour. It is conceded that there were from one to three inches of ice, snow and sleet on the pavement. Eight or ten witnesses on behalf of appellant testified that the ruts or paths in the snow were near the center, or to the north of the center of the pavement, while twenty-two witnesses on behalf of appellee testified they were on the south side of the pavement. On the material points, relative to the manner in which the cars came together, five witnesses testified, four for appellant, and one for appellee. Appellant insists that because of the fact that Armstrong had been convicted of a felony, that he should be disbelieved, and that the four witnesses who testified for appellant established his cause of action as alleged in his declaration. We have no doubt the court took Armstrong's prior conviction into consideration in determining the weight to be given to his testimony. If the facts depended entirely upon the evidence of Armstrong there might be some grounds for the contention that the preponderance of the evidence was in favor of the contention of appellant, but Armstrong's evidence does not stand alone, and it is to be viewed in the light of the whole evidence. It is apparent from the whole evidence that both parties were traveling under such conditions as required that each should have taken every precaution to avoid an accident. The greater the difficulties or dangers which confronted the parties the greater should have been the p

been the precaution taken by each. Whether appellant was in the exercise of due care, and whether the evidence established the negligence of appellee were questions of fact. Pauckner vs. Wakem, 231 Ill. 276. The evidence was submitted to a jury which disagreed. It was then submitted to the court before whom the case was originally tried and there was a finding that appellant was not entitled to recover. In order for this court to reverse this judgment it would be necessary for us to say that the judgment was manifestly against the weight of the evidence. On account of the many conflicts in the evidence on so many points of vital importance, we do not feel we would be justified in so doing. The trial court saw the witnesses and heard them testify and was better able than we are to determine what weight should be given to each item of evidence.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 28th day of Dec., in the year of our Lord one thousand nine hundred and twenty-one.

Justus L. Johnson

Clerk of the Appellate Court

Abstract.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On JAN 15 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Rehearing denied & opinion modified by modified April 6, 1927.

7630

Agenda 23.

Fred E. Cabeen,
Appellant

vs.

The Farmers National Bank of Aledo, a Corporation, et al
Appellees.

APPEAL FROM THE CIRCUIT COURT OF MERCER COUNTY.

Jett, J.

243 I.A. 638

On June 30, 1921, Frank L. Sponsler was indebted to appellee The Farmer's National Bank of Aledo, in the sum of Six Thousand Dollars, and the bank at that time held his obligation for that sum. He was desirous of borrowing more money and to that end made a financial statement to Bridgford, the president of the bank, who declined to make the additional loan and informed Sponsler that it would be necessary for him to secure his existing indebtedness. Appellant, Fred E. Cabben, was at that time, assistant cashier of the bank and also brother-in-law of Sponsler, and according to the testimony of Bridgford, the financial condition of Sponsler was discussed and Cabeen expressed a willingness to help his brother-in-law through his financial difficulties. As a result of the conversation there held Sponsler on that day executed a new note to the bank without surety for the six thousand dollars existing indebtedness and executed to the bank another note for Three Thousand Dollars, with Cabeen as surety. This $3000.00 was paid by Sponsler on August 28, 1922. On June 30, 1921, Cabeen also executed his individual demand promissory note to said bank for $6000.00, this note stating that it was given to protect the bank against loss on any paper signed by Sponsler, and that when all of Sponsler's obligations to the bank were paid then this note was to be null and void. Sponsler and his wife at this time executed and delivered to Cabeen a judgment note for $9000.00 in order to secure him for assuming his suretyship liability, and on December 9, 1922, Cabeen took judgment thereon, On December 1, 1922, Sponsler executed his note in the sum of eight thousand dollars to

APPEAL FROM THE CIRCUIT COURT
OF MORGAN COUNTY.

appellant, which by its terms, became due in one year after date and the payment of this note was secured by a chattel mortgage duly acknowledged, and recorded on December 2, 1922. On December 21, 1922, appellees, The Aledo State Bank, A. G. Bridgford, and the Farmers National Bank of Aledo, each obtained judgments by confession against Sponsler and his wife upon various notes which they held. On January 2, 1923, Cabeen executed his promissory note for $6630.00 due six months after date and payable to the order of The Farmers National Bank and his note of June 30, 1921, was surrendered by the bank to him. On August 20, 1923, suit was instituted upon this note of $6630.00 by the Live Stock Exchange National Bank of Chicago, to whom it had been endorsed and transferred and on January 3, 1924, judgment was rendered thereon, which judgment was on the same day paid by Cabeen.

On January 6, 1923, the chattel mortgage executed by Sponsler to Cabeen on December 1, 1922, was foreclosed and subsequently a stipulation was entered into between Cabeen, the Sponslers, the Aledo State Bank and the Farmers National Bank, wherein it was recited that all the parties mentioned therein claimed the property listed in said mortgage, and it was agreed that appellant should proceed to dispose of the mortgaged property, and that the proceeds derived from the sale thereof should be deposited with the First National Bank of Aledo until the difference between the parties should be determined. The property was thereupon sold and the net proceeds amounting to $5173.29 were deposited according to the stipulation. It was further stipulated that the personal property covered by the chattel mortgage was the only property Sponsler owned and that on June 30, 1921, and from that time on, Sponsler was insolvent.

On October 1, 1923, appellant Fred E. Cabeen instituted this proceeding and subsequently filed his amended and supplemental bill by which he sought to have this fund of $5173.29 ordered paid to him, and that the court should also decree he had a valid prior lien on the real estate of Blanche Sponsler, wife of Frank L.

Sponsler, to such an amount as might be necessary to indemnify him on account of the payment by him of the judgment entered on the $6630.00 note. All of the defendants insist that Cabeen has no interest in the proceeds of said chattel mortgage sale, it being the contention of A. G. Bridgford and The FarmersNational Bank that additional sums of money had been advanced to Sponsler and that the note given by Sponsler and the chattel mortgage to secure the payment of the same were given to Cabeen as agent or trustee for the benefit of Bridgford and the bank and as security for such additional loans, and were executed only for the purpose of securing Cabeen for the payment of any obligations of Sponsler's to him over and above the amount due on the $6000.00 note. It is further contended by all the defendants that appellant had not paid any part of the debt on which he had incurred liability as a surety at the time the property was seized by him under his chattel mortgage and he therefore had no right to foreclose his lien. The Aledo State Bank also contends that the taking of the chattel mortgage by Cabeen from Sponsler was intended by them not merely as indemnity to Cabeen, but was for the purpose of hindering and delaying creditors and is therefore fraudulent and void as to it. The Sponslers were both adjudged bankrupts and their trustee is a party to this suit. The trustee contends that appellant has no lien on the real estate of Blanche Sponsler as the judgment upon which the execution was issued and certificate of levy filed was void for the reason that the judgment was based on a note given by the Sponslers as security to appellant, and at the time judgment was taken, appellant had paid no part of the debt of the bankrupts. The Aledo State Bank and the trustee in bankruptcy each filed cross bills setting forth their respective contentions and after the issue had been made up the cause was heard by the chancellor who denied any relief to appellant and found that he had no interest in the mortgage except as agent and trustee for The Farmers National Bank and decreed that the fund derived from the sale of the property covered by said chattel mortgage, together with

the accumulated interest thereon, should be paid to the Farmers National Bank, A. G. Bridgford and Aledo State Bank to be applied pro rata on their several judgments which they obtained against Sponsler on December 21, 1922. From that decree appellant appealed.

In addition to the foregoing facts, it also appears from the evidence and the stipulation of the parties, that on December 1, 1922, Sponsler was indebted to The Farmers National Bank to the extent of $13,745.00. That upon the judgment in favor of appellant and against Mr. and Mrs. Sponsler rendered December 9, 1922, an execution was immediately issued and on December 13, 1922, levied upon the undivided interest of Blanche Sponsler in the premises described in the amended and supplemental bill. According to the testimony of appellant and Sponsler, he, Sponsler, came to the bank December 1, 1922, in response to a notice from Bridgford, who inquired of him in appellant's presence what he could do about the indebtedness to the bank, then amounting to about $14,000.00. That several plans were discussed and at Bridgford's suggestion Sponsler took two notes each for $3000.00 and was to try and get them signed by neighbors or relatives. Bridgford also directed appellant to take a chattel mortgage on all of Sponsler's personal property which would take care of the $6000.00 note which appellant had theretofore given the bank, and after that was paid the balance was to go to the bank. The note and chattel mortgage was signed and the mortgage was duly acknowledged that evening and recorded on the following day. According to the testimony of Bridgford, it was on June 30, 1921, that he told appellant he had better take a chattel mortgage to himself to secure himself against any outside creditors and that he also told both appellant and Sponsler not to pay anything to the Aledo State Bank, as the bank of which he was president was holding appellant responsible for any sum paid to the other bank. Bridgford testified to another conversation which he had with appellant about six months later in which appellant asked him whether he should loan Sponsler some money to buy feed and Bridgford

told him to furnish him with money as long as appellant was security for the loan. In November 1922, Bridgford says appellant told him that he had loaned Sponsler money with which to buy cattle and appellant also informed him that Sponsler had paid the Aledo State Bank $1275.00 when he had shipped his cattle. Bridgford then told appellant he would have to get behind this additional indebtedness and he again told appellant that he had better get Sponsler to come in and give a chattel mortgage. In the conversation of December 1, 1922, according to Bridgford, he instructed appellant to take a chattel mortgage for $8000.00 but he denies that he said such mortgage would protect appellant on his $6000.00 note, and that if there was anything left it could be turned over to the bank to be applied on Sponsler's indebtedness to it. Bridgford says that it was a couple of days after this that they had Sponsler come in for the purpose of getting additional personal security.

Appellant's version as to what occurred on June 30, 1921, is corroborated by Sponsler and the record fails to show any promise on the part of appellant to stand good for any sums loaned Sponsler other than those which he gave his individual obligations to protect. As late as December 1922, it is apparent from this record that The Farmers National Bank did not regard appellant obligated to take care of all of Sponsler's obligations because Bridgford says he at that time told appellant that he, appellant, ought to get behind the $3000.00 loaned Sponsler for cattle and also the $1275.00 that being the amount of a check of Sponsler's honored by appellant, the proceeds of which went over to the Aledo State Bank. At the time the cattle were purchased appellant was not at the bank but Sponsler made arrangements to secure the money for the initial payment with Bridgford himself. Other amounts which went to make up the total indebtedness to The Farmers National Bank were loaned Sponsler by officers of the bank other than appellant.

The evidence convinces us that it was an afterthought on

the part of the Farmers National Bank to try to hold appellant for this additional indebtedness and this view is confirmed by the fact that the bank, either at the time the chattel mortgage was given or subsequent thereto, drew up two notes each for $3000.00 and gave them to Sponsler and endeavored to get them executed by other sureties, and according to the testimony of the father of Frank Sponsler, Bridgford, as late as the latter part of December, 1922, sought to have him sign a $10,000.00 note as security to the bank for his son's indebtedness. It was when all these efforts failed that Bridgford determined to assert that this mortgage was held by appellant for the bank and to fasten upon appellant the unsecured excess of Sponsler's indebtedness to it.

Appellees insist that appellant had no right to foreclose this mortgage unless it is shown that Sponsler became insolvent after the giving of the mortgage and that if appellant knew of the insolvency of Sponsler at the time he accepted the mortgage, he cannot avail himself of the proceeds derived from a sale of the mortgaged property until he has actually paid the debt. We cannot concur in this view, The reason for permitting a surety for an insolvent to reduce to possession pledged property before he is damnified, is that such seizure will prevent his certain loss. A surety of an insolvent will necessarily ultimately be damnified and it would be ridiculous to hold that he must await the maturity of his obligation and then discharge it before he can exercise his rights in a pledge which has been given him for his protection. To compel him to do so would be to permit other creditors to avail themselves of the insolvent's property to the detriment and loss of the surety who holds the pledge.

The decree in this case is manifestly wrong, even if the evidence sustained the contention of appellee. If appellant was a mere agent or trustee for The Farmers National Bank, then that bank was entitled to all the proceeds derived from the sale of the mortgaged property, as that mortgage was a prior lien to all of the judg-

ments.

In our opinion, this chattel mortgage was given for the purpose of indemnifying appellant, and there is no evidence to sustain the contention that it was given in order to hinder and delay creditors nor is there any evidence which sustains that portion of the decree which invalidates the lien acquired by appellant by virtue of the judgment, execution and certificate of levy on the real estate of Blanche Sponsler.

It is finally insisted that the chattel mortgage of appellant was void as to judgment creditors inx as much as the mortgagor, at the time it was executed, was a resident of the town of Millersburg, in Mercer County, and it was acknowledged by a Justice of the Peace of the Town of Mercer. In Lyons v. Peoples Bank of Lexington, 317 Ill. 44, it was held that a chattel mortgage to be valid against the rights and interests of third persons, must be acknowledged before a Justice of the Peace of the town where the mortgagor resides, but here the record discloses that all the judgments of appellees were rendered on December 21, 1922, by the Circuit Court of Rock Island County, and on January 6, 1923, transcripts were filed in the office of the Circuit Clerk of Mercer County, but it was not until the 8th day of January 1923, that executions were issued thereon. An execution is a lien upon and binds the goods and chattels of the person against whom it is issued only from the time it is delivered to the sheriff to be executed. The record discloses that the executions were delivered to the sheriff January 8, 1923, and two days prior ~~The record here is silent as to when these executions were delivered to the sheriff, but it does disclose that two days prior to the time they were issued~~ appellant had reduced the property covered by his mortgage to his own possession and advertised a sale thereof. This mortgage was valid as between appellant and the mortgagor and appellant having taken possession of the mortgaged property prior to the time any rights of any judgment creditor intervened.the judgment creditors are in no position now to question its

validity.

The decree of the circuit court is reversed and the cause remanded to the circuit court of Mercer County with directions to dismiss the cross bills for want of equity and to enter a decree in favor of appellant for the relief prayed for in his amended and supplemental bills.

Reversed and remanded.

with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of June in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On JAN 15 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

THE PEOPLE OF THE
STATE OF ILLINOIS,

Defendant in Error,

-vs-

JENNIE MARGARITIE, alias
JENNIE FOSSLER.

Plaintiff in Error.

Error to the County
Court of Stephenson
County.

243 I.A. 638

Jett, J.

The states attorney of Stephenson County filed an information consisting of two counts charging Jennie Margaritie, alias Jennie Fossler, plaintiff in error, with the violation of the Prohibition Act by selling intoxicating liquor. In the first count it is charged that the sale was made on the 28th day of November, 1925. In the second count it is charged that a sale was made by the plaintiff in error on the 30th day of November, 1925.

A jury trial was had and the plaintiff in error was found guilty in manner and from as charged in the first count of the information. Motions for a new trial and in arrest of judgment were made, overruled, and judgment rendered on the verdict. Plaintiff in error was sentenced to serve seventy-five days in the county jail and to pay a fine of $250.00 and to stand committed until fine and costs were paid.

A number of reasons are assigned for a reversal of the judgment. It is first insisted that the court erred in denying the motion to quash the information. It is the contention of plaintiff ~~on~~ in error that the information consists of only one count and it is insisted by defendant in error it consists of two counts. We have diligently examined into the record and are of the opinion that the ~~information~~ consists of two counts and the contention of plaintiff in error that the information should be quashed because it charges more than one offense in one count is not well taken because the

Defendant in Error,

Error to the County
Court of Stephenson
County.

Plaintiff in Error.

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tion consisting of two counts charging Jennie Marquardtie, alias
Jennie Koesler, plaintiff in error, with the violation of the pro-
hibition act by selling intoxicating liquor. In the first count
it is charged that the sale was made on the 28th day of November,
1919. In the second count it is charged that a sale was made by
the plaintiff in error on the 30th day of November, 1919.

A jury trial was had and the plaintiff in error was found
guilty in manner and form as charged in the first count of the in-
formation. Motions for a new trial and in arrest of judgment were
made, overruled, and judgment rendered on the verdict. Plaintiff in
error was sentenced to serve seventy-five days in the county jail
and to pay a fine of $250.00 and it stands committed until the fine and
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motion to quash the information. It is the contention of plaintiff
in error that the information contains of only one count and it
is insisted by defendant in error it contains of two counts. We have
carefully examined into the record and are of the opinion that the
information contains of two counts and the contention of plaintiff
in error that the information contains of only one count is untenable.

offenses charged against the plaintiff in error are charged in two counts.

The evidence discloses that a witness by the name of Quinn testified that he was employed as an investigator and to look for violators of the Prohibition Act; that on the 28th day of November, 1925 he went to the home of plaintiff in error and on that occasion purchased a bottle that he insists contained intoxicating liquor. This bottle obtained on the 28th day of November, 1925, by Quinn for the purposes of the trial was marked Exhibit 1. It is the contention of plaintiff in error that there is no competent evidence as to the alcoholic contents of Exhibit 1, except the testimony of the witness Quinn, and that his testimony bearing upon the question of the alcoholic contents of said Exhibit 1, should not have been allowed to go to the jury. The record discloses that on the trial of the case the witness Quinn was asked if he knew whether or not the liquid contained in the bottle marked Exhibit 1 contained more than one-half of one percent of alcohol by volume. An objection was made by the plaintiff in error and the court overruled it. The witness answered that he did. His answer further was that he had it tested with a government standard hydrometer and he was then interrogated as to whether or not the hydrometer tested more than one-half of one per cent of alcohol by volume and he said that it did. This testimony was also objected to and the objection was overruled and a motion was then made by the plaintiff in error to strike the testimony of the witness Quinn from the record. The motion to strike the testimony was denied. There is no evidence in the record showing in any manner the accuracy of the hydrometer or to show that the one making the test had had any previous knowledge and experience in handling hydrometers and making tests of liquids to determine the alcoholic contents. There is nothing to show that the witness Quinn had any previous knowledge of making such tests by the use of a hydrometer and that he was qualified to determine the results of

such tests. We think that the court was not only in error in admitting the testimony of the witness Quinn as to what the hydrometer tested but also erred in admitting Exhibit 1 to go to the jury. If the testimony of Quinn was competent as to what the hydrometer showed relative to the alcoholic contents of Exhibit 1 then it would have been competent to permit him to state what some one told him it contained.

The second instruction given on the part of the defendant in error is as follows: "The Court instructs the jury that the information in this case consists of two counts, the first charging the defendant with selling intoxicating liquor on the ~~30~~ 26th day of November A. D. 1925, and again selling intoxicating liquor on the 30th day of November A. D. 1925, said intoxicating liquor being fit for beverage purposes and containing more than one-half of one percentum of alcohol by volume and sold without a permit from the attorney general of the State of Illinois, and not being for mechanical, sacramental or scientific purposes." It is insisted by the plaintiff in error that this instruction is erroneous. We do not think the instruction is subject to the criticism made of it. The instruction informs the jury of the charge in the information. It was nor reversible error to give it.

It appears that the information was sworn to by the states attorney and the affidavit among other things stated that the "matters and things set out in the information are true." It further appears that when the jury retired to consider of their verdict they were permitted to take the information to the jury room during their deliberations. Affidavits were filed to the effect that the plaintiff in error had no knowledge that the information had gone to the jury room until after the verdict had been returned. In the ~~question~~ consideration of the case by the jury in determining the question of the guilt or innocence of the plaintiff in error they had the information containing the affidavit of the states attorney in which he had sworn that the matters and things set out in the information were true. It is insisted that this was detrimental

to the interests of the plaintiff in error. It is impossible to know what influence, if any, this had upon the jury in their deliberations in determining the guilt or innocence of the plaintiff in error. It was perfectly proper for the jury to take the information to the jury room with them, but the affidavit should have been detached or covered in some manner so as not to be visible to the jury. The states attorney would not have been permitted even in his argument to state that it was his opinion that the defendant was guilty unless his opinion was based upon the evidence in the case.

In view of the state of the record we are of the opinion that reversible error was committed in the trial of this cause. The judgment of the County Court of Stephenson County is therefore reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Jan. in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson

Clerk of the Appellate Court

abstract

5724a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On JAN 15 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

LAFAYETTE ASHCRAFT,

Defendant in Error,

-vs-

R. B. KIRKPATRICK,

Plaintiff in Error.

Writ of error
to the Circuit Court
of Peoria County.

243 I.A. 638

Jett, J.

This is an action on the case for malpractice brought by Lafayette Ashcraft, defendant in error, against R. B. Kirkpatrick, plaintiff in error, in the Circuit Court of Peoria County. A jury trial was had which resulted in a finding in favor of the defendant in error and against the plaintiff in error in the sum of $1500. Judgment was rendered on the verdict from which the plaintiff in error prosecutes this writ of error.

For the purposes of this opinion the defendant in error will be referred to as the plaintiff and the plaintiff in error as the defendant.

The declaration consists of two counts. The first charges that the plaintiff employed the defendant as a physician to treat him for a certain sickness and malady from which he was then suffering and that the defendant not regarding his duty as a physician unskillfully and negligently conducted himself and through his want of skill and care the sickness and malady of the plaintiff became greatly aggravated and increased to his damage. The second charges that the plaintiff broke his arm and the defendant as a physician undertook to treat the same; that not regarding his duty as such physician so unskillfully and negligently conducted himself that he utterly failed to set the bones in plaintiff's arm and that as a result the plaintiff became sick and his condition became greatly increased and aggravated and he suffered great pain and that it was necessary for him to undergo an operation to have his arm rebroken and reset to his damage.

2431 A. 638

To the declaration the defendant pleaded the general issue. : appears that the plaintiff, a hod-carrier by trade, on November th, 1924 while cranking a Ford automobile fractured the radius of is right arm about two inches above the wrist joint. He was taken the office of the defendant for the purpose of receiving treatment or his injured arm. According to the testimony of the plaintiff the efendant reduced the fracture and placed the arm in a splint; he laced the ends of the broken bones in position and examined his arm om day to day until he loosened the ends of the bandages; that sever- days afterwards he took off the bandage and made an examination to e if the arm was all right; that he found the broken parts to be in oper position; that he rebandaged the arm and replaced it in splints.

It further appears that the plaintiff continued to make gular visits to the defendant for treatment and after some time was le to manipulate his fingers fairly well and was discharged by the fendant. About January 10th, 1925, the plaintiff went to the defend- t's office and complained of the swollen condition of his arm and ggested to the defendant that an X-ray picture be taken. The fendant discouraged having this done because of the expense and after- ards plaintiff went to see Dr. Meizner who caused an X-ray picture to taken. This picture disclosed that the bones were not in apposition. aintiff was taken to the hospital where his arm was rebroken and then set. At the time of the trial an almost complete recovery had been d and plaintiff was enabled to follow his usual occupation.

The defendant testified that he treated plaintiff's arm in e usual and customary manner employed in such cases; that upon the rival of the plaintiff at the office he made an examination of the m and found it broken about two inches above the wrist joint; that it s a simple fracture; that he immediately procured a metal splint of e kind customarily used in such cases; filled the inside of it with ttom, pulled the arm down and manipulated it until the broken ends

of the bone were in apposition and then applied the splint and bangaged it to the arm with strong tape. The defendant further testified that he knew the ends were in proper position because he could feel the bone and ascertained that fact by making an examination; that he examined the arm from day to day and after a few days loosened the ends of the bandage to relieve the tension upon the arm as is usual and customary in such cases. In three or four days thereafter he took the bandage off, made an examination to see if the arm was all right, found the broken parts of the bone to be in place and in proper position and then rebandaged the arm placing the splint in the usual and customary way. Plaintiff came to his office every two or three days thereafter and the arm was examined upon each call. He later on became able to manipulate his fingers fairly well and there was nothing to indicate other than a good result. Doctor Meizner and Doctor Collins testified on behalf of the plaintiff and nothing can be gathered from the testimony of either of them tending to show that the treatment employed by the defendant was unskillful or negligent. There is nothing in the record to disclose that the defendant was in any manner either unskillful or negligent. It is necessary for the plaintiff to aver and prove the negligence charged in the declaration. No competent testimony even tending to support the averment was presented. There is no questio that the plaintiff suffered a simple fracture of the right arm. Nor is there any question but that the defendant treated the arm for the purpose of reducing the fracture. The issue in the case is whether the defendant is guilty of negligence and lack of care in the treatment; whether the treatment given by him was improper and other than the usual and customary treatment given like cases by ordinary, skillful and careful physicians in the vicinity where the defendant practices his profession. The plaintiff has failed to introduce any evidence that the treatment given by the defendant was improper or that the defendant was guilty of any unskillfulness, negligence or lace of care.

Whether or not the treatment was ordinarily skillful and appellant's conduct and management of the case was that of an ordinarily careful and skillful physician is largely an expert question to be determined from the testimony of witnesses learned and experienced in that kind of service. Goodman vs Bigler, 133 Ill. App. 301.

In Sims vs Parker, 41 Ill. App. 284 the court said: "Proof of a bad result or of a mishap is of itself no evidence of negligence or lack of skill. The defendant is qualified to practice medicine and sugery, and the evidence of the experts in his profession shows him competent and skillful. Before a recovery could be had against him, it must be shown that his treatment was improper or negligent, not merely that he was mistaken or that his treatment resulted injuriously to plaintiff. A physician or a surgeon, or one who holds himself out as such, is only bound to exercise ordinary skill and care in the treatment of a given case, and in order to hold him liable it must be shown that he failed to exercise such skill or care. (McNevins vs Lowe, 40 Ill. 209)."

"The jury cannot draw the conclusion of unskillfulness from proof of what the result of the treatment was, but that the treatment was improper was shown by evidence.

"' No presumption of the absence of proper skill and attention arises from the mere fact that the patient does not recover, or that a cure was not effected! (Haire vs Reese, 7 Phil. R. 138)."

"No man, skilled or unskilled, undertakes that he shall be successful; 'he undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith or dishonesty, but not for lapses consequent upon mere errors of judgment' (Cooley on Torts 777; Holtzman vs Hoy, 118 Ill. 534)."

In Moine vs Christy, 180 Ill. App. 334, the plaintiff met with an accident by which one of his fingers was crushed. He was taken to the office of the defendants who were physicians and surgeons and was treated by them. An infection ensued and several

operations were required for the purpose of reducing the infection, and the usefulness of the patient's hand was permanently impaired. In the decision of the case the court among other things siad: "No expert testimony was offered showing that the unfavorable results of the wound were caused by want of care or skill in the treatment by the defendants."

"The law seems to be well settled that the mere fact that a good result is not obtained in the cure of a wound is of itself no evidence of negligence or lack of care, but there must be affirmative proof of such negligence or lack of care, and that the injuries complained of resulted therefrom. It seems also to be settled by the authorities that such proof can only be established by the testimony of experts skilled in the medical and surgical profession."

We have examined the record in detail and are of the opinion that the plaintiff failed to establish a case as charged in his declaration. According to our view the case has no merit on the facts.

Complaint is made of instructions but in view of the conclusion we have reached we do not deem it necessary to consider the errors alleged in the giving or refusing of instructions.

The judgment of the Circuit Court of Peoria County is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Jan. in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

243 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On FEB 1 - 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEORGE VUJOICH, Appellant,
-vs-
J. B. ANDERSON, Appellee.

Appeal from the County Court of Lake County.

Partlow, P. J.

243 I.A. 638

On May 19, 1923, Louis Katich and Valinka Katich, his wife, executed to appellant George Vujoich, a chattel mortgage for $4500, on certain grain, farm implements, stock, household goods and other personal property. The mortgage was filed for record in Lake county on May 22, 1923. On October 6, 1923, judgment by confession was entered against Louis Katich, in the circuit court of Lake county, on a note for $4425.00, dated September 22, 1922, in favor of appellee, J. B. Anderson, and an execution was levied on the property covered by the chattel mortgage. Appellant filed notice of a trial of the rights of property in the county court of Lake county as provided by statute. A jury was waived, and upon a trial by the court, there was a finding in favor of appellant. Appellee made a motion for a new trial on the ground of newly discovered evidence which would show that the chattel mortgage was fraudulent. A new trial was granted. The jury returned a verdict in favor of appellee. Judgment was entered on the verdict, and this appeal was prosecuted.

As grounds for reversal, appellant contends that there should have been a directed verdict in favor of the appellant; that all of the evidence establishes the validity of the mortgage; that there is no evidence of either the invalidity of the mortgage, or of any fraud; that the verdict is manifestly against the weight of the evidence.

Fraud is never to be presumed. The person alleging fraud must prove it by clear and convincing evidence. Valbert vs. Valbert, 282 Ill., 415; DeSalvo vs. Anderson, 200 Ill. App., 29; Costello vs.

[illegible] VUJOICH, Appellant,
-vs-
[illegible]. ANDERSON, Appellee.

Appeal from the County Court of Lake County.

[illegible]low, J. J.

2431.A. 638

On May 19, 1923, Louis Katich and Velinka Katich, his [illegible], executed to appellant George Vujoich, a chattel mortgage for $[illegible]00, on certain grain, farm implements, stock, household goods [illegible] other personal property. The mortgage was filed for record in [illegible]e county on May 22, 1923. On October 6, 1923, judgment by [illegible]ation was entered against Louis Katich, in the circuit court of [illegible]r county, on a note for $4428.00, dated September 22, 1922, in favor of appellee, J. B. Anderson, and an execution was levied on [illegible] property covered by the chattel mortgage. Appellant filed [illegible]ice of a trial of the rights of property in the county court of [illegible]e county as provided by statute. A jury was waived, and upon a trial by the court, there was a finding in favor of appellant. [illegible] made a motion for a new trial on the ground of newly dis- [illegible]covered evidence which would show that the chattel mortgage was [illegible]ulent. A new trial was granted. The jury returned a verdict [illegible]favor of appellee. Judgment was entered on the verdict, and this [illegible] was prosecuted.

As grounds for reversal, appellant claims [illegible] [illegible] been a directed verdict in favor of the appellee; that all of [illegible] evidence establishes the validity of the mortgage; that there is [illegible] evidence of either the invalidity of the mortgage, or of any fraud; [illegible] the verdict is manifestly against the weight of the evidence.

Fraud is never to be presumed. The person alleging fraud [illegible] prove it by clear and convincing evidence. Vulbert vs. Talbert, [illegible]. 418; Phillips vs. Anderson, 200 Ill. App. 321; Hamlin vs. [illegible]

Delano et. al., 201 Ill. Appe, 16; Pollard vs. G. & J. Coal Co., 210 Ill. App., 11. To prove fraud every element constituting it must be proven by such clear and convincing evidence so as to leave the mind well satisfied that the allegations of fraud are true. Wolfe vs. Lawrence, 276 Ill. 10; Struve vs. Tatge, 285 Ill., 103. Sometimes fraud cannot be established by direct testimony and can only be established by circumstances which justify the conclusion that fraud exists. Carter vs. Carter, 283 Ill., 324.

The evidence on behalf of appellant shows that for fifteen years appellant had been engaged in the coal, wood and ice business in Chicago. He had known Katich for fourteen years and they had been good friends, both being Servians. Katich and wife first lived on a few acres in Chicago where they raised vegetables and fattened hogs. They then moved to a place near Glenville where they had about 80 acres of land. In October, 1922, they leased a farm from Harry A. Dooley, in Ela township, in Lake county. Appellant testified that he loaned Katich $4500.00, and kept an account of it in a little memorandum book where he put down the various amounts, but did not put down the exact date, and only kept track of the years. In 1920 he made eighteen loans totaling $1875.00. In 1921 he made nine loans totaling $1240.00. In 1922 he made seventeen loans totaling $1385.00. He testified that Katich came to him at various times and places and said he needed money to buy a horse, a cow, or some pigs. The loans were always in cash and he either took the money out of his pocket or got it out of a box at the bank. He had no checking account, but had a savings account. He testified he had a box in the bank in which he kept some money. He visited Katich on the farm on a few occasions and shortly before the mortgage was given he asked Katich to repay the money, and Katich said he could not pay but he was willing to give a mortgage, thereupon the note and mortgage were prepared in Chicago, were acknowledged before a justice of the peace in Lake county, and filed for record in the recorder's office. The property levied upon under the judgment was the same property covered

by the mortgage, except that three cows had been sold and three or four exchanged, and fifteen pigs levied on were not included in the mortgage. Appellant waived any right to these cows and pigs.

Peter Adech, who worked for appellant, testified he saw money paid by appellant to Katich twice in 1922, and saw Katich at the house of appellant on several other occasions. Nick Vujoich, a cousin of appellant, testified he saw money paid by appellant to Katich on several occasions. Mrs. Katich testified that they executed a mortgage because they could not pay the money, and that they owed the money. She testified that when the money was paid to her husband at various times she did not see the payments made but she saw the money when her husband brought it back to the house.

On behalf of appellee, Harry A. Dooley, who was the landlord of Katich, testified that appellee also signed the lease. Appellee testified that he was engaged in selling and buying cattle and horses. He sold cattle and horses to Katich, and that he got a note in the fall of 1922, for $4425.00, and took judgment by confession on October 6, 1923; that he took no steps to collect the note from the time it was given until the judgment was taken, but that he consulted an attorney with reference thereto and found the judgment by confession could not be taken on the note until after maturity.

The question is whether or not this evidence was sufficient to prove such a fraud as invalidated the chattel mortgage and made the judgment a prior lien. Appellee relies on the fact that appellant kept no books, had no checking account, and that the money which he loaned Katich consisted of forty-four different loans ranging in amount from $25.00 to $225.00; that he never took a receipt or note for any of these loans and that none of them was ever paid by a check; that he charged no interest and that no money was ever paid back; that Katich lived in the country and never had an automobile, and in 1920 lived nineteen miles away from appellant and later lived forty miles away; that the account book kept by appellant was offered in evidence and has been certified to this court; that the book was kept by a man who

handled coal but that it was clean and not a single one of the forty-four entries was made with a soiled hand or a dull or broken pencil; that there were no other accounts in the book; that there is not a single date after any of them except the year, and that all of the payments are in multiples of $5.00; that on the first trial appellant testified "I got no bank - I got a small bank." On this trial he produced a savings account and testified that sometimes he got money out of his pocket and sometimes went to the bank; that the savings accout shows that there were only two withdrawals during the period covered by the loans, both of which were on July 1, 1922, one for $401.61, and the other for $3012.08; that appellee sold horses, pigs and cows to Katich and helped him buy his machinery, hay, and grain, and went security on the lease. In December, 1922, appellee asked Katich for a mortgage, and when he took his note to his attorney he discovered that the note provided that judgment could be confessed at any time after maturity instead of at any time after the date thereof; that appellant's note and mortgage were executed during the time appellee was trying to collect his note.

Whether or not this chattel mortgage was a fraud on the rights of appellee was a question of fact for the jury. The jury saw the witnesses and heard them testify, therefore the jury was in a better position than we are to determine the question of fact as to the validity of the mortgage. We are not at liberty to reverse the judgment unless it is manifestly against the weight of the evidence. The judgment is not against the manifest weight of the evidence and it should not be reversed on that account.

On cross-examination Mrs. Katich was asked whether or not in a conversation between her husband and Mr. Dooley the husband said that he did not owe appellant anything on that chattel mortgage, and she was asked whether she did not stand by and not deny it. This question was asked her for the purpose of laying the foundation for an impeachment. When Dooley was called as a witness he was asked

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whether or not in that conversation Mrs. Katich stated that she was sick of this chattel mortgage and would have nothing to do with it and he answered that she made such a statement. The question asked of Dooley should have been substantially the same as the question put to Mrs. Katich, but we do not think this error was sufficient to reverse the judgment.

The ninth instruction given on behalf of appellee told the jury that if they believed from the greater weight or preponderance of the evidence that Katich did not owe appellant $4500.00, their verdict should be for appellee. The only evidence in the case with reference to the amount due from Katich to appellant was $4500.00. Under the evidence if Katich did not owe appellant $4500.00, he did not owe him anything. The instruction was based on the evidence and there was no error in giving it.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 1st day of Feb. in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

5650

243 I.A. 639

Gen. No. 7832 Agenda 43

April Term, A. D. 1926

People of the State of Illinois, Defendant in Error

vs.

John Walbley, Plaintiff in Error

Error to the Circuit Court of Vermilion County.

CROW, P. J.

John Walbley was convicted in the Circuit Court of Vermilion County upon an indictment charging him with unlawfully having in his possession intoxicating liquor. He brings the record to this court, assigning twelve errors. The brief of plaintiff in error contains but one point: that People's instruction number four was erroneously given. Under Rule 23 of this Court only that error will be noticed in determining the question of reversal.

The evidence shows that three deputy sheriffs went to Walbley's place of business at Westville with a search warrant authorizing them to search his place of business for intoxicating liquor; that when they entered, Lape, one of the deputies, went to the bar, the bar extending east and west; that when he got about two-thirds of the way down the bar he met Walbley; that Walbley ran to the west end of the bar, as did Lape; that Walbley made a pass under the bar and there was a pitcher in the sink and witness ran around the end of the bar and took the pitcher out of the box about two feet square and half full of water. Cassel, one of the deputies, put some of the water in bottles; that defendant laughed about it and said that was his rinse water. There were about two gallons of water in the basin and the contents tested thirty-five percent alcoholic content. The pitcher had a very strong odor of white mule. The samples taken had been locked up in the basement of the jail all the while to the time of trial. The water in the basin had an odor of white mule. The tests were made the evening the stuff was seized. The tester was one used by the United States agents in testing the strength of liquor. There were several people

in the place at the time of the seizure.

Defendant denied dumping the contents of the pitcher. He accounted for the presence of the pitcher in the place by saying his wife brought his coffee in it; that it was not in the drain but on the side of it. He denied having intoxicating liquor in his place of business back of the bar; had no white mule and did not knock the pitcher into the drain. On cross-examination he said the pitcher was empty when the officers came in. One of the witnesses for defendant, present that evening, said he was familiar with the odor of white mule and there was no odor of it there; that the water was a little sour; that the contents of the bottles offered in evidence had a different odor from the contents of the wash basin. Both Gilman and Fallan testified they were sitting on a table four feet high looking at Walbley when the officers came in.

The only point made in the brief is the giving of the following instruction at the instance of the prosecution: "The jury are instructed that the rule requiring the jury to be satisfied of the guilt of the defendant from the evidence beyond a reasonable doubt in order to warrant a conviction is complied with if, taking the evidence altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty. The reasonable doubt that the jury is permitted to entertain to authorize an acquittal must be as to the guilt of the accused on the whole evidence and not as to any particular fact in the case."

At the instance of defendant the Court gave to the jury the following: "You are further instructed that the law in the State of Illinois provides that the alleged intoxicating liquor or liquors must have been fit for beverage purposes in order to make such a possession unlawful, and if you believe from the evidence that the alleged intoxicating liquor introduced in evidence by the State was not or is not fit for beverage purposes then it is your duty to acquit the defendant."

The giving of the instruction for the prosecution has been condemned many times. Among the reasons for its vice in **People v. Johnson,** 317 Ill. 430 (436) the Court say: "Every fact necessary to constitute the crime must be proved beyond a reasonable doubt. If one such fact is not proved by the measure of proof required by law, then the crime itself is not proved so as to authorize a conviction. It is not correct to say that a reasonable doubt as to any particular fact in a case is not sufficient to justify an acquittal, without distinguishing between facts which are material and constitute a necessary element of the crime and those which are not so material and necessary." Another valid reason for refusing the instruction is, it is a merely abstract statement of law not based upon the evidence of facts, to which the jury's attention is directed, thus leaving the jury, uninstructed and uninformed as they are, to wrestle with the abstraction. They may or may not make a correct application of it. For the reason it is abstract, if they are not further informed as to the facts necessary to be proved, it affords no assistance in their deliberation.

Counsel for plaintiff in error contends that this instruction "was especially prejudicial error in the case at bar. A **particular fact** in the case was the question as to whether the liquor introduced in evidence was fit for beverage purposes and intended for use as a beverage, and yet, the instruction to the jury if followed by them would have justified them in absolutely disregarding the mooted question in the case and finding the plaintiff in error guilty on general principles."

The argument would be very convincing if the Court had not, as requested by defendant, instructed the jury specifically and very forcefully on that point in the instruction quoted above. Knowing as all having experience in such things do know, that recitals of particulars are more impressive than mere abstractions, we do not believe that the jury would or could be led away from the vital issue insisted upon by plaintiff in error. Reading or hearing read, the two instructions, it is

not likely that the abstract would be as impressive as the concrete direction that they must be able to find that the liquor found was fit for beverage purposes. This is not a case sometimes arising where the Court instructs both ways, involving a palpable contradiction. The only actual information the jury had was that contained in defendant's instruction quoted.

We are of the opinion, therefore, the only insistence made in the brief is not well grounded. Other objections are made in the argument but under the rule we disregard them. The judgment of the Circuit Court is affirmed.

Affirmed.

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243 I.A. 639

Gen. No. 7936 Agenda 1

April Term, A. D. 1926

August Boltz, et al, Appellants,

vs.

Laura Kush et al, Appellees.

Appeal from the Circuit Court of Macon County

CROW, P. J.

This case comes on appeal to reverse a decree of the Circuit Court dismissing the bill of complainants for want of equity upon the report of a Master in Chancery upon a reference. In the statement preceding the brief and argument of appellant it is said the bill was for "an accounting and certain relief incidental thereto." The brief then contains what purports to be the substance of the bill.

By the marginal numerals in the abstract, the record consists of 251 pages. Numerous marginal numbers in locating pages of the record are followed by the words "Complainants' Exhibit" giving the number. One such reference is "230 copy of defendants' exhibits X and Y, bank signature cards." Another is, "231-objections of complaints to report of master in chancery." Another, "237 court order overruling exceptions to master's report, rendering decree, taxing cost against complainants." Another, "238-246 Decree." The bill is referred to in the same manner and indicates it will be found on pages 1 to 12 of the transcript, and the answer of defendants, as shown by the numerals, occupying 18 pages of the transcript is indexed: "27-45 Answer of defendants to bill of complainants." The master's report and conclusions, the objections before the master, and the exceptions before the chancellor are all omitted.

To secure the review of a judgment or decree of an inferior court on appeal or on error, there must be a transcript of the record, an abstract of the record, and a brief

April Term, A. D. 1939

August Bolte, et al, Appellants,

vs.

Laura Kush et al, Appellees.

Appeal from the Circuit Court of Macon County

(BROWN, P. J.

This case comes on appeal to reverse a decree of the Circuit Court dismissing the bill of complainants for want of equity upon the report of a Master in Chancery upon a reference. In the statement preceding the brief and argument of appellant it is said the bill was for "an accounting and certain relief incidental thereto." The brief then contains what purports to be the substance of the bill.

By the marginal numerals in the abstract, the record consists of 251 pages. Numerous marginal [illegible] exhibits A and 1, [illegible]. An- "231-objections of complainants to report of [illegible] clearance". Another, "237 court order over- [illegible] exceptions to master's report, rendering de- [illegible] cost against complainants. Another, [illegible] Decree," The bill is referred to in the same [illegible] indicates it will be found on pages 1 to [illegible]-transcript, and the answer of defendants, [illegible] the number, [illegible] 18 pages of the [illegible] indexed "27-45 Answer of defendants to [illegible] complainants." The master's report and con- [illegible]

to which may be appended an argument of counsel. But they are distinct steps in the procedure of review, and are required to be prepared in conformity with the rules of practice of the reviewing court. Rule 9 of this court relates to the transcript of the record, its contents and method of preparation. It requires authenticated copies of the process, pleadings, verdict, judgment or decree, bill of exceptions, certificate of evidence or report of the master and appeal bond. Rule 22 relates to the abstract of the record, its contents and method of preparation. So far as now material, it provides:

"In all cases the party bringing a cause into this court shall furnish a complete abstract or abridgment of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed in a neat and workmanlike manner. *** The abstract must contain a complete index, alphabetically arranged, giving the page where each pleading, exhibit, or other document may be found. **** The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment furnished by the plaintiff's counsel, to furnish such further abstract as he shall deem necessary to a full understanding of the merits of the case."

It has often been said by the Supreme Court and repeated by the Appellate Courts of this state that an index is not an abstract. **Davis v. Strauch**, 182 App. 451; **Starrs v. Terry**, 130 App. 538; **Barber v. Mellish-Hayward Co.** 209 App. 299. The pleadings must be set out as the rule requires. **Dunlap v. Trainmen**, 214 App. 376; **Highley v. Dean**, 168 Ill. 26; **Hayes v. Gressens**, 207 App. 149; **Christy v. Elliott**, 216 Ill. 31; **Kuhel v. Sterling**, 164 App. 371. The requirement of the rule that the abstract shall be indexed so completely ought to be sufficient warning that the abstract must be more than a mere index. The provision of the rule for an additional abstract is not license of laxity in observing the rule. The abstract is a pleading of the appellant or plaintiff in error. **McGovern v. Chicago**, 202 App. 139. If he has not stated enough in such pleading to manifest the errors relied upon, his adversary is under no obligation to aid him. But it sometimes occurs that the abstract is

misleading by reason of omission, to the detriment of appellee. He may file an additional abstract to protect himself and under the rule have the cost of it taxed to his adversary, if actually necessary.

The foundation of a suit in equity is a bill stating the material facts from which the complaining party conceives his right to demand relief arises. Only facts must be stated. Upon an inspection of the bill upon demurrer, and applying to the facts some legal or equitable principle not expressed, but implied, as being in the mind of the pleader, if a ground for equitable relief appears an answer is required. In default of an answer, the bill is taken as confessed and relief may be awarded without more ado. But the soundness of the bill conceded, the equity appearing upon its face may be overcome by denial of the facts or by statement of other facts avoiding or averting the conclusion of its equity. No case in equity can be determined without a bill.

It is clear, therefore there is nothing here presented for review. The master's report on an order of reference must be set out for the chancellor cannot make a decree independent of it except by consent of both parties. The objections to his tentative report must appear in the record, for only those matters so presented to him can be raised by the exceptions before the chancellor except matters of law. But whether such matters are presented by the record a court of review can only know from the avertments and charges in the bill and the answer thereto, in connection with the evidence. None of these except the evidence are in the abstract. We cannot determine therefore that the chancellor erred in his ruling upon exceptions to the master's report or in making the decree he rendered with all these things before him.

Error not appearing, the decree of the Circuit Court is affirmed.

Affirmed.

625/6

Gen. No. 7967 Agenda 4

April Term, A. D. 1926

Caroline Barton, Appellee

vs.

Herbert J. Olehy, Appellant

243 I.A. 639

Appeal from the Circuit Court of Vermilion County

CROW, P. J.

Appellee was injured by reason of a collision between an automobile driven by her son-in-law, and and another driven by appellant, on a street in Danville. The declaration consists of six counts in each of which it was averred that at all times before the collision plaintiff was in exercise of due care and caution for her own safety, and that by reason of the negligence of defendant charged in each count, the two automobiles came into collision at the street intersection described, that the car in which she was riding was overturned by which she was permanently injured in her spine, her collar bone broken, her right hand crushed, necessitating its amputation between the elbow and wrist. The **ad damnum** was laid at $15,000.

The collision occurred at the intersection of Kingdom Avenue and Fairchild street. Kingdom Avenue extends north and south and crosses Fairchild Street extending east and west at a right angle. The car in which appellee was riding was driven east following appellant's car fifteen to forty feet for a block and a half. It was charged in the declaration that when appellant reached the intersection he suddenly, with no warning to the car following him, turned his car directly across Fairchild Street intending to go north on Kingdom Avenue, and that by so doing the driver, son-in-law of plaintiff, was unable to know his intention and ran into car of defendant, striking it a little to the rear of the midway, both cars overturning and resulting in the injury stated.

The evidence as abstracted has been examined carefully.

Upon one crucial point it is in sharp conflict. The point is, due care on the part of plaintiff at and immediately before the collision. The evidence discloses that the car in which plaintiff was riding was following and had followed for a block and a half the car driven by defendant. They maintained a distance from each other estimated at from fifteen to forty feet. It should be assumed by the driver and passengers of a car following another in a city where streets cross at right angles that at any intersection, the car in front presenting a condition of peril, may turn, under traffic regulations, into any street intersecting on which it is traveling. That condition imposes on drivers and on occupants of such vehicles the duty of caution and the exercise of that degree of care commensurate with the peril. It is known by all using automobiles that they cannot be suddenly turned at a right angle without being exposed to danger of being overturned.

The entire evidence shows that in some way the car of appellant was crossing the path of appellee's car at the time it was struck. It was struck on the left side a little to the rear of the middle, and the injury to it shows the impact was strong. From all the evidence we must conclude that the rear car was traveling fast or that it was quite close to the front car when it began to turn. The evidence showing the cars had maintained the same distance apart while traveling on Fairchild street, they must have been running at the same rate of speed.

It is contended as ground for reversal that the jury was imporperly instructed as to the law applicable to the facts. Both parties requested and the court gave instructions advising the jury that it was necessary that the driver of the automobile in which plaintiff was riding should have been in the exercise of due care and caution at and immediately before the collision. Other instructions given for appellant advised the jury that plaintiff and the driver should have been exercising such care; and another that plaintiff should have been exercising such care.

If defendant at the trial had strictly confined his request

for instructions to the proposition that before plaintiff could recover it was necessary that she prove by a preponderance of the evidence that at and immdiately before she was injured she was in the exercise of the required degree of care for her own safety, the point now so strongly urged for reversal upon the authority of **Flynn v. Chicago City Ry. Co.**, 250 Ill. 460, would appeal strongly for reversal of the judgment, plaintiff's instructions remaining as they now are. We are of the opinion that the care of the driver of the car in which plaintiff was riding, was, under the evidence, immaterial, and that the care of the plaintiff was controlling. But a party cannot by procuring the giving of an instruction afterward insist as ground for reversal of a judgment against him that his adversary's instructions contain the same vice. This principle of appellate practice has been so often announced that citation of supporting authorities is not necessary. Neither is the principle inapplicable when an instruction is so modified by the court as here complained of, if the modification conforms to erroneously requested and given instructions on the same point, on behalf of the complaining party. The modification of defendant's instruction does not justify a reversal of the judgment.

The doctrine of the **Flynn case** is that the negligence of the owner and driver of a vehicle cannot be imputed to a person riding with him, in case of a collision between the vehicle and another conveyance, (in that case a street car) but such person is responsible for his own negligence, and if his negligence contributes to his injury he cannot recover. The doctrine is supported and illustrated by a wealth of authorities rarely found in decided cases. Along with it is responsibility of those engaged in a "common enterprise". But that question, so far as the record discloses, is presented now for the first time. If the driver of the car in which plaintiff was riding was negligent under the circumstances and she was exercising the required care he would be liable for the injury. But if he or the driver of the car in front of them was negligent and she was not in the exercise of due care for her own safety, she could

recover from neither.

The case having been tried, so far as some of the instructions disclose, upon the theory that the negligence of care of the driver of her car was material, we are not warranted in reversing the judgment of the Circuit Court and it is therefore affirmed.

Affirmed.

243 I.A. 639

Gen. No. 7972 Agenda 40

April Term, A. D. 1926

Walter C. Hoehn, Defendant in Error

vs.

Charles Gould, Plaintiff in Error

Error to the City Court of Pana

CROW, P. J.

Defendant in error brought suit against plaintiff in error to recover damages for an assault and battery. Hoehn had rented a garage from Gould and in addition to his car he had placed garden tools in it. There was a toilet in the garage used by Gould. In the evening Gould went to the toilet and stumbled over the tools. He says he was not angry but went immediately to the residence of Hoehn only a few feet away and knocked on the door. When Hoehn went to the door he invited Gould to come in, which he declined to do, but inquired "who put them garden tools in the garage?" To which the reply was, "I did." Gould then said to him "you folks better get another place to move." The reply to that was, "I am paying rent on that garage." Hoehn testified, "he hit me in the corner of the eye, I don't know what with. It kind of stunned me. He said, 'God damn you, if that ain't enough, come out here and I will cut you into strips. I was bleeding and could not see out of my left eye." The testimony of Gould shows that the controversy was about garden tools being in his way. He says that at the house Hoehn threatened to beat his brains out and that Hoehn's wife told him to beat out his (Gould's) brains. Another version of his testimony as abstracted is, "his wife told him to kill me and he grabbed me by the throat and said he would. I gave him a lick that put him clear back against the bed-room window. He hit the corner of the house and fell back of the window. I only used my fist. I had no weapon. He staggered and fell against the corner of the house and said "I will kill you." I said, "if you bother me any more, I will eat you up and spit you out." Plaintiff in error's daughter also testified in corroboration of his testimony. Two physi-

cians testified to the nature of the injury and that in their opinion it was inflicted with some hard instrument.

Plaintiff in error filed pleas of general issue and self-defense. The jury returned a verdict fixing damages at $500. Motion for new trial was denied and judgment rendered on the verdict for that amount. To reverse it the defendant brings the record to this Court by writ of error. While the usual errors are assigned only three are relied on in the brief and that limits the inquiry here. The first is, the verdict is manifestly against the weight of the evidence. The evidence as abstracted by plaintiff in error and an additional abstract by defendant in error, has been carefully read and considered. Looking at it all together, we think no fair minded man sitting out of the atmosphere of the controversy could say that the verdict should have been different. It is only when that conviction is engendered in the mind of a reviewing court that reversal will be awarded as being against the evidence. It is also contended the verdict was the result of passion and prejudice. But if supported by the evidence when all of it is considered, we cannot say it was the result of passion and prejudice, rather than of conviction by the evidence.

The second ground for reversal is the refusal of defendant's instructions 1 and 2. The first is:

"The court instructs the jury that under the declaration in this case and facts alleged here, there could be no vindicatory or exemplified damages. If you find the defendant guilty, the only damage that could be assessed, is for such damages as actually was incurred by the defendant to the plaintiff." The declaration as abstracted is: "Plaintiff alleges that on the 26th day of November, 1924, the defendant made a violent assault upon the plaintiff, cutting a deep wound in his head, by reason of which he became hurt and disabled and sustained damages, for which suit is brought." The manner of the assault as charged—and that is the objection to it as the basis of

exemplary damages—indicates the infliction of injury under circumstances justifying such damages if sustained by the evidence. The objection to the refusal is not, therefore, well taken.

The other ground is the refusal of the following instruction: "The court instructs the jury that if you believe the assault was made in self-defense, and defendant did not more than repel an assault upon himself, or had reasonable grounds to believe he was about to be assaulted under such circumstances in such manner that to a reasonably prudent man it appeared necessary for him to defend himself, then he would be liable and under such circumstances your verdict should be, not guilty." The incongruous statement contained in it, "if you believe the assault was made in self defense," etc. condemns it at once. The assailant cannot rely on self defense, civil nor criminal, as a general proposition. Only when assailed under such circumstances as would induce a reasonably prudent person to believe he is in danger of serious bodily harm may he repel force by force to prevent the impending consequences. But if he is the assailant, seeking another in his home, producing a serious wound as the jury was warranted in believing, self-denfense cannot be invoked. There are other objections to the instruction, but that pointed out is enough.

We find nothing justifying a reversal of the judgment and it is affirmed.

Affirmed.

6652b

Gen. No. 7974 Agenda 10

April Term, A. D. 1926

The People of the State of Illinois, Defendant in Error

vs.

Mary Miller, Plaintiff in Error 243 I.A. 639

Error to the County Court of Macon County,

CROW, P. J.

Plaintiff in Error was convicted in the county court of Macon County on an indictment charging her with selling intoxicating liquor in violation of the laws of this state. There were nine counts in the indictment and the jury found her guilty as charged in seven of the counts. Motions for new trial and in arrest of judgment having been denied the court imposed fines aggregating $700 on four of the counts and jail sentence aggregating ten months upon three of the counts, the time of confinement in the county jail to run consecutively and not concurrently. The judgment carried the costs, for which it was adjudged she stand committed to the common jail until said fines and costs were paid. Motions for new trial and in arrest of judgment were interposed in proper order and denied. To reverse the judgment of the county court this writ of error is prosecuted.

As to the evidence, it is sufficient to say it was abundantly sufficient to support the finding of the jury. The liquor was sold in a room in a house on the corner of Broadway and William Street in Decatur. The uncontradicted evidence is that defendant there sold intoxicating liquor fit for beverage purposes to some of the witnesses and that Hollenbeck sold to others. But the evidence shows that on the occasions when Hollenbeck sold liquor the Miller woman was present. She did not testify. From certain questions asked at the trial, Hollenbeck appears to have been tried in the Circuit Court for the same offense. It is clearly established that the plaintiff in error is guilty of selling

liquor as charged in the indictment. Some of the witnesses say they went into the place to get a drink, one saying there were several men there when he went in and one was lying down. No useful purpose would be subserved by reviewing the evidence.

It is insisted that the indictment and each count of it is so defective that the verdict and judgment cannot be supported by it. No motion to quash the indictment was filed. The motion in arrest of judgment alleges: "The indictment upon which trial was had herein is not sufficient upon which to base a judgment, and each count thereof fails to charge an offense against the statutes of the state of Illinois."

It must be said of the several counts of the indictment that they are encumbered with surplussage. But that is a vice in pleading that can only be reached by special demurrer, specifying the grounds therefor. Not having demurred specially, and taking the judgment of the court thereon, error in form has been waived. The only question presented by the motion in arrest is, Do the counts state facts showing a violation of the statue alleged to have been violated?

We are of the opinion the indictment and each count of it states facts sufficient to charge that defendant violated the statute prohibiting the sale of intoxicating liquor, and that the court did not err in overruling the motion to arrest judgment on the verdict. It conforms to the requirements of **Tate v. People** 316 Ill. 52. Complaint is made of the giving and refusing of instructions. At the request of the prosecution the court gave thirteen instructions and for the defendant a like number. No error is pointed out in argument to the given instructions. No argument is made as to the soundness of those refused, except the first. As to that, it is contended it should have been given because it

told the jury that unless the prosecution had proved that defendant had no permit to sell intoxicating liquor, the defendant should be acquitted. In this counsel is in error. If it were necessary to the validity of the indictment for the unlawful sale of intoxicating liquor to negative the possession of a permit, the permit being in defendant's possession she must show it, a **prima facie** case of sale being made. But a permission by any officer to sell liquor for beverage purposes would be a nullity. There is nothing in the statute that supports the contention of plaintiff in error.

The fault of plaintiff in error's contention grows out of a misapprehension of the meaning and application of section 40 of the Illinois Prohibition Act, the terms of which are clear. The case of **People v. Tate,** 316 Ill. 52, does not support the contention. In that case the court held that in prosecutions for **possession** of intoxicating liquor **with intent to sell,** if there is a conflict in the evidence as to the purpose for which the liquor was kept it is error to instruct the jury that the possession is **prima facie** evidence that it was for the purpose of sale. But the indictment here is for selling which shows the purpose of possession and there is no conflict in the evidence as to the sales. If she were being prosecuted for having in her possession intoxicating liquor and contended in defense of the possession a permit, the burden would be on her to establish it by the evidence after the **prima facie** case made. This is all the statute means and it has been so interpreted by the Supreme Court and different Appellate Courts. Under the state of the evidence guilt is so clearly established that errors in instructions would not work a reversal.

There is nothing in the record justifying a reversal of the judgment. Plaintiff in error is clearly guilty of the

offense charged as a matter of fact and law and the judgment is affirmed.

Affirmed.

5653

243 I.A. 640

General No. 7980 Agenda 16

April Term, A. D. 1926

Charles Moore, Defendant in Error

vs.

Leslie Cook, Plaintiff in Error

Error to the Circuit Court of Sangamon County.

CROW, P. J.

Plaintiff brought an action of assumpsit against defendant, filing the common counts. On motion of defendant plaintiff was required to file and filed a bill of particulars showing that the claim was for merchandise, lumber and building material furnished by him for the construction of a building being erected by contractor for the defendant. Defendant filed the general issue. On trial by jury a verdict was returned for the full amount of the claim. Motion for new trial was overruled and judgment was rendered on the verdict for the sum of $864.85. Defendant prosecuted a writ of error to reverse the judgment.

The evidence shows that plaintiff furnished the lumber and material with which a house was built for denfendant and that it was furnished for that purpose. Plaintiff wrote letters to defendant demanding payment of the bill but he did not pay and did not deny liability when charged therewith in the letters. Defendant claimed he paid the bill to Cullimore the builder and that Cullimore kept telling him he was paying the money to plaintiff. Plaintiff told him in response to that claim he had received no pay and would "run a lien" on the house to get his pay. Defendant said, "Don't do that. I will pay you. Give me more time and maybe we can collect it out of him."

On the evidence as abstracted by plaintiff in error and by defendant in error in a supplemental abstract, there

is no doubt that plaintiff sold the lumber to the amount claimed and for which judgment was rendered, and that defendant got a house out of it. If he did pay the lumber bill to the builder he assumed the risk of its not being paid to the lumber merchant. He must pay again for his folly in not paying to the lumber merchant. Something is said in the brief about the statute of frauds as applicable to the defense. But there is nothing in the case that renders that defense available. We have considered the case carefully and hold that the facts are as contended by plaintiff. We find no error in the rulings of the court nor in the instructions given that would warrant a reversal of the judgment. It was clearly right and is affirmed.

Affirmed.

3654

243 I.A. 640

General No. 7987 Agenda 22

April Term, A. D. 1926

Harold D. Bever, Appellee,

vs.

Commercial Credit Trust Company et al
First Acceptance Corporation, Appellants

Appeal from the Circuit Court of McLean County

CROW, P. J.

The action was one in replevin. The purpose of the action was to recover an Overland sedan. The declaration averred defendants took and unlawfully detained the sedan of the value of $1000. The pleas, so far as we can determine from the abstract, were: (1) That defendants, nor either of them, did not take the sedan; (2) property in defendants; (3) property in one Earl Mayfield and not in plaintiff; (4) avers the giving of a mortgage by the said Carl Mayfield, then the owner, to Oliver Smith, and assignment to defendants, First Acceptance Corporation. The abstract recites: "last plea, demur sustained to." Two additional pleas were filed, the first averring the making of a mortgage of the automobile by Mayfield, he then being the owner thereof, on June 24, 1925 to Oliver Smith and afterward assigned to defendant, First Acceptance Corporation, that it "became due" wherefore the defendant detained the automobile. The second additional plea by First Acceptance Corporation averred that plaintiff being the owner of the automobile delivered it to Carl Mayfield to make and execute the mortgage as owner, that he did make it to Oliver Smith for a valuable consideration. That it was duly acknowledged and assigned to defendant and that the covenant of the mortgage having been broken defendant took the car as lawfully he might. The abstract then recites

"13. Replication of plaintiff. 15. Replication to seventh original and first original and first and second additional pleas. 18. Verdict of the jury finding issues for plaintiff." The numbers are marginal on the abstract, designating pages of the transcript.

A verdict was returned for plaintiff, motion for new trial overruled and judgment rendered on the verdict. Defendants have appealed, apparently, though the record as abstracted speaks only of defendant.

There are two valid reasons for affirmance of the judgment: 1. The abstract of the record is so meager we cannot determine whether the trial court committed error in rulings on evidence or in giving and refusing instructions. 2. Appellant has filed no brief as required by Rule 23 of this court.

Touching the first, it is elementary that the question of relevancy is determined only by the issues made by the parties in their pleadings. The declaration being in the **cepit** and **detinuet,** a plea of **non cepit** puts in issue only the taking. What questions of fact were put in issue would depend not only upon the pleas filed, but the manner in which they were met by plaintiff in his replication and the issue thereon. All that the abstract informs us is, that there were replications. All presumptions are indulged in favor of judgments and rulings of the trial court. Error must, therefore, be made to appear. Rule 22 requires the party bringing a cause into this court to furnish a complete abstract or abridgment of the record, referring to the pages of the record by numerals on the margin. An index is not an abstract. We will not go to the transcript to reverse a judgment even if transcript disclose reversable error.

Rule 23 referred to **requires** a brief and **permits** an argument. Its language is, Each party shall file a printed brief in the cause. It is further provided, No alleged error

or point not contained in such brief shall be raised afterward by ****oral or printed argument. The rule provides that the brief of a party may be followed by an argument in support of the brief which shall be distinct therefrom though bound together.

The judgment of the Circuit Court is affirmed.

Affirmed.

525 Ja

243 I.A. 640

Gen. No. 7990 Agenda 25

April Term, A. D. 1926

J. B. Highmore, Appellee,

vs.

Illinois Central Railroad Co. Appellant.

CROW, P. J:

Appellee loaded twenty-one horses and six mules into a stock car of appellant for shipment from Springfield to National Stock yards. The horses weighed from 900 to 1200 pounds each and the mules 850 to 1050 pounds. The car in which they were loaded was a slatted stock car forty feet long and eight feet wide. By the shipper's contract he was required to load and unload the stock into the car at his own risk. They were loaded at the regular place for loading about four or half past four o'clock in the afternoon. After loading, the car was removed about a quarter of a mile to the railroad yards without switching or being connected with other cars, for the stock train to pick it up to be hauled to destination. When the conductor in charge of the train in which the car was to be included examined the car he found one of the horses, described as a brown horse, down. It was thereupon returned to the loading chute for unloading and the shipper notified that the animals were fighting, and that a horse was down and that the car must be unloaded. They were unloaded. After allowing the horses to rest a short while all except a gray horse were reloaded. This horse while being reloaded fell between the side of the car and platform of the loading chute and received an injury of which complaint is made. The jury returned a verdict for plaintiff for the sum of $275.00, and, after motion for a new trial had been denied, the Court rendered a judgment on the verdict with costs and the appeal followed.

One of the horses is described as brown and the other gray or iron gray. The brown horse was five years old, and

weighed approximately 1200 pounds. The evidence shows that the horses were kicking and fighting, after the car had been transferred to the yards to be included in the train. The brown horse's condition, when unloaded as hereafter stated, is best described by the shipper: "After opening the door we found after leading out several horses, in fact, all that was up came out, and in going into the car we had a lantern and we found that there was one horse down in the car that had been trampled on. We finally got him up and got him out into the chute and down into the lot. He was a brown horse, five years old, weighed about 1200 pounds. I had bought him the Saturday before. When taken out he was very wet with perspiration. He had a winter coat of hair and his hair was wringing wet. It was dark in the lot and we could not make a careful examination of him but I noticed that after he had gotten out in the air and when he was up on his feet, plenty of room to stand, he began to recover and apparently got all right. I looked him over the best I could with a lantern and found on the right side that he had a lump, possibly not any larger than your fist. The lump was on the right side between the hip and the last rib, pretty close to the end of the ribs in the flank. We let him stand there a while until he finally seemed to recover and began to cool off and we loaded him back into the car." Witness saw no lumps, bruises, or injuries, before loading into the car the first time and saw no fighting or kicking or anything of the kind in the car. After loading and sealing the car the shipper's contract was given to witness and he left. One of the witnesses, a veterinarian, testified that he saw the brown horse at National Stock Yards when the shipment arrived. "The lump in his flank was as large as a four gallon bucket. He was ruptured and the intestines protruded out through the wall."

With regard to the brown horse there is no evidence that tends to show any act or omission on the part of the

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With regard to the brown horse there is no evidence that tends to show any act or omission on the

carrier that would produce his injury for which damage is claimed. It is apparent from the evidence that the rupture in the horse's flank could not have been produced by the manner in which the car was handled from the chute to the place in the yards where it was to be connected with the train. No one contradicts the testimony as to the manner in which the car was handled as detailed by those who handled it. All that plaintiff says as to the condition of the horse when first loaded is, that he noticed nothing of the condition found when reloaded and at destination. The evidence is abundant that the horses were fighting in the car before the rupture was discovered and while in transit. The horse was found lying down in the car, sweating profusely, shortly after the first loading and the rupture was found soon after. The fact it had become so aggravated in form when the shipment reached its destination demonstrates, as nearly as such matters are capable of demonstration, that the injury was recent. It can be readily accounted for by the disposition of the animals as told by witness of their fighting in the crowded car. Nothing else in the record tends to account for it.

As a matter of law, it is true that where stock is delivered in good condition and reaches its destination in bad condition, the burden is on the carrier to show that it was not negligent. But the rule has no application when stock is loaded for shipment in a physical condition such as this horse had when last loaded and is enormously aggravated at destination. An animal ill with incipient rupture, with no assignable cause produced by the shipper, reaching destination severely ill with the rupture, cannot be the subject of damages in an action against a carrier. A careful consideration of all the evidence impels to the conclusion that the finding of the jury was clearly contrary to the law and the evidence and that the Court should have directed a verdict as to the brown horse.

The injury to the gray horse consisted of a cut on the

carrier that would produce his injury for which damage is claimed. It is apparent from the evidence that the rupture in the horse's flank could not have been produced by the manner in which the car was handled from the chute to the place in the yards where it was to be connected with the train. No one contradicts the testimony as to the manner in which the car was handled as detailed by those who handled it. All that plaintiff says as to the condition of the horse when first loaded is, that he noticed nothing of the condition found when reloaded and at destination. The evidence is abundant that the horses were fighting in the car before the rupture was discovered and while in transit. The horse was found lying down in the car, sweating profusely, shortly after the first loading and the rupture was found soon after. The fact it had become so aggravated in form when the shipment reached its destination demonstrates, as nearly as such matters are capable of demonstration, that the injury was recent. It can be readily accounted for by the disposition of the animals as told by witness of their fighting in the crowded car. Nothing else in the record tends to account for it.

As a matter of law, it is true that where stock is delivered in good condition and reaches its destination in bad condition, the burden is on the carrier to show that it was not negligent. But the rule has no application when stock is loaded for shipment in a physical condition such as this horse had when last loaded and is enormously aggravated at destination. An animal ill with incipient rupture, with no assignable cause produced by the shipper, reaching destination severely ill with the rupture, cannot be the subject of damages in an action against a carrier. A careful consideration of all the evidence impels to the conclusion that the finding of the jury was clearly contrary to the law and the evidence and that the court should have directed a verdict as to the brown horse.

The injury to the gray horse consisted of a cut on the

leg. The appellee was present at the loading of the horses into the car for shipment. His contract required, that he should load and unload the shipment at his own risk and expense. It was during the reloading that the injury to this horse occurred. To get them into the car, an incline, extending from the ground upward to nearly level with the sill of the car door was used. There was a space of three feet between the higher end or platform of the incline and the car door when in position for loading. To bridge the space for horses to go in, an apron two inches thick and 46 inches long, was used. It was furnished by the carrier and provided with cleats on the under side, by which it was held in place by laying it with the cleat on the inside of the car door, the other end resting on the platform of the chute slightly lower than the door.

The evidence was conflicting as to the manner in which the apron was placed in the car, and as to its condition of safety. If it in fact had cleats as described by the witnesses for defendant, and if, as contended by them, the apron was not properly placed in the car door and on that account slipped and fell, then there would be no liability. Every question as to safety of the apron and the cause of its falling was contested by the evidence. Defendant contended that it was placed with the upper end resting upon bedding in the car and that the horses walking on it caused it to slide out of the car. If so placed, it was manifestly unsafe. Plaintiff's witnesses as stoutly contend that the cleats were of thin strips of plank and would not hold the upper end in the door and for that reason it slipped away from the car and let the horse down. There was an iron strip across the door on the sill, as we understand the evidence. If the cleat was as thick as defendant's witnesses say it was and if the floor of the car at the door was as full of bedding material as they say, then plaintiff was negligent in attempting to load the horses into the car

because not used as intended. But if the cleat was as thin as plaintiff's witnesses say, it would be a proper question for the jury as to whether defendant exercised reasonable care to furnish a reasonably safe apron for the purpose of loading. And the question would further remain whether, even in that condition plaintiff was not negligent. It was the duty of plaintiff at his risk and expense to load. But if defendant furnished the facilities for loading and did not fulfill the measure of his duty as defined, it would be liable, if plaintiff in loading exercised reasonable care—the care that would be exercised by a reasonably prudent person, with plaintiff's knowledge and experience in such things, under the conditions then existing.

We think these questions are not closed to inquiry and that they were proper to be determined by the jury. Under the undisputed evidence as to the injury of the brown horse, the evidence shows that the injury can in no way by chargeable to defendant. The judgment of the Circuit Court is reversed and remanded, for further proceeding consistent with the foregoing opinion.

Reversed and Remanded.

General No. 7973 Agenda 9

April Term, A. D. 1926

Johanna Gallivan and Gerald J. Gallivan, as Executors of the Last Will and Testament of Thomas J. Gallivan, Deceased, Appellees

vs.

Chester & O'Byrne Transfer Co., Appellant

Appeal from Champaign

243 I.A. 640

NIEHAUS, J.

Thomas J. Gallivan brought this suit in the circuit court of Champaign county to recover damages for injuries sustained by him, and alleged to have been occasioned by negligence of an employe of the appellant, Chester & O'Byrne Transfer Company, who was driving one of appellant's taxi cabs along University Avenue in the City of Champaign. After the first trial of the case, Gallivan died of heart disease. It is not claimed that the heart disease referred to resulted from the injuries in question suffered by the deceased. After the death of the original plaintiff, the appellees, Johanna Gallivan and Gerald J. Gallivan, as executors were substituted as plaintiffs. The judgment previously recovered against the appellants was reversed by this court on a previous appeal, for errors in instructions given at the first trial; and the cause remanded. Gallivan v. Chester & O'Byrne Transfer Co. (Gen. No. 7772) The cause was thereupon redocketed in the court below, and another trial was had which resulted in a verdict and judgment for $1300.00, from which this appeal is prosecuted.

It is contended as a ground for reversal of the judgment appealed from, that there "Is a total want of showing due care on the part of Gallivan;" and 'that at any rate the verdict is manifestly against the weight of the evidence on the finding of the jury that due care was exercised by Gallivan at the time of the injury.' We find, that there is uncontradicted evidence in the

April Term, A. [illegible]

J. Dallivan, Deceased, Appellees

vs.

Chester & O'Byrne Transfer Co., Appellant

Appeal from Champaign

record which tends to show that Gallivan was in the exercise of such care as an ordinarily prudent person would have exercised under similar circumstances. The matter of due care as a question of fact is properly for the jury to determine. A court of review can determine adversely to the plaintiff on this point only when no other conclusions can be reasonably drawn from the uncontradicted facts and from the evidence of the plaintiff. **Pienta v. Chicago City Ry. Co.** 284 Ill. 246; **Kelly v. Chicago City Ry. Co.** 283 Ill. 640.

It is contended also, that the first instruction is in effect identical with the instructions that caused the previous reversal of the case. We cannot agree with this contention; the vice of the instructions referred to was, that they assumed as a matter of law, that the driving on the left hand side of University street was negligence; but the instruction complained of is not subject to this criticism. It merely refers to the left of the center, and the north side of the public highway, as the place where the taxi was being driven. Nor can we say, that the other criticism made concerning a summary of facts in the instruction is well founded. Appellant complains of the action of the court in refusing instructions No. 2 and 6. It is sufficient to say, concerning this contention, that the subject matter of these instructions which the appellant was entitled to have given to the jury, was embodied in other instructions which were given to the jury. The record does not disclose any reversible error, and the judgment is therefore affirmed.

Affirmed.

5656

243 I.A. 640

General No. 7976 Agenda 12

April Term, A. D. 1926

William H. Jones, Appellee

vs.

The County Board of the County of Logan in the State of Illinois, Appellant

Appeal from Logan.

NIEHAUS, J.

William H. Jones, appellee, a resident of Logan county, filed a petition for a mandamus in the circuit court of Logan County, to compel the county board to issue a license to him, to operate a dance hall under the provisions of the Act of the General Assembly for the Regulation of Dance Halls, Chapter 34, Section 195 to 203 Cahill Illinois Revised Statutes. The petition contains the following averments in reference to a compliance by the petitioner with the requirements of the Act referred to:

> The petitioner William H. Jones, of the County of Logan, in the State of Illinois, respectfully complaining shows unto the Court here that he is a native citizen of the United States of America and is a citizen of the State of Illinois and that he has resided in the County of Logan in the state of Illinois more than twenty years last past.
>
> Petitioner further represents that he is the owner of a tract of land of to-wit, Thirty-one and 37-100 (31.37) acres in the Southeast Quarter (SE 1-4) of the Northwest Quarter (NW 1-4) of Section Five (5) in Township Nineteen (19) North, Range Two (2) west of the third principal meridian in the County of Logan and State of Illinois and resides thereon and that he has resided thereon for the term of seven years last past.
>
> Petitioner further represents that he was born at Lucasville in the State of Ohio; that he has never been convicted of a felony or of a misdemeanor punishable with or by a minimum imprisonment of six months or longer, under the Laws of the State of Illinois. Petitioner further represents that prior to the first day of July, A. D. 1925, to-wit, during the month of May A. D. 1925, petitioner constructed a dance platform and pavilion upon the said premises above described, in a certain pasture or enclosure near his residence and improved the same and provided the same with electric lights for said dance hall and the said grounds, and expended in his said business for the construction and improvement and lightning of aid dance platform and pavilion and said grounds, the sum of to-wit Five Thousand ($5000) Dollars, which sum he has invested in his said business for carrying on and holding public dances upon said premises in said dance hall.

Petitioner further says that he has so carried on said business at the premises aforesaid for more than four months last past. Petitioner further says that he is and always has been a person of good moral character, and that the place or building where the said dance hall has been so, operated and maintained reasonably conforms to all laws and health and fire regulations applicable thereto and is properly ventilated and supplied with separate and sufficient toilet arrangements for each sex and was and is a safe and proper place and building for a public dance hall.

Petitioner further represents that he has at all times carried on his said business in conformity with the laws of this State.

Petitioner further represents that the said premises are located outside of the corporate limits of the City of Lincoln, Illinois, and are situated in the County of Logan aforesaid.

Petitioner further represents that heretofore to-wit, on the 28th day of August A. D. 1925 he duly made out, executed and verified by his oath the application to the County Board of the County of Logan in the State of Illinois to operate and maintain a dance hall, in the words following to-wit:

State of Illinois, County of Logan, ss.

The undersigned, W. H. Jones, hereby makes application to operate a dance hall and being first duly sworn, deposes in answer to the following interrogatories concerning said application:

Name, W. H. Jones. Address, Box 277, Lincoln, Illinois.

Residence of Applicant, Sec. 5, 19-2, Chester Twp. Logan County, Illinois.

Duration of above residence. Seven years.

Place of Birth. Lucasville, Ohio.

Are you a naturalized citizen—

State time and place of such naturalization—

Have you ever been convicted of a felony or a misdemeanor, punishable under the laws of this state by a minimum imprisonment of six months or longer? No. Location of the place or building where the applicant intends to operate or maintain the Dance Hall. N. W. 1-4 Sec. 5, Town 19, Range 2, Logan County, Ill.

The applicant further establishes that he is a person of good moral character and that the place or building where the dance hall is to be operated or maintained, reasonably conforms to all laws and health and fire regulations applicable thereto and is properly ventilated and is supplied with separate and sufficient toilet arrangements for each sex and is a safe and proper place or building for a public dance hall.

W. H. Jones.
Signature of applicant.

Subscribed and sworn to before me this 28th day of August 1925.

David S. Mowrey,
County Clerk.

To this petition the appellant, County Board of Logan County, filed a general and special demurrer. The court sustained the demurrer insofar as the same was special, but overruled it insofar as the same was general; and the appellant

Petitioner further says that he has so carried on said business at the premises aforesaid for more than four months last past. Petitioner further says that he is and always has been a person of good moral character, and that the place or building where the said dance hall has been so, operated and maintained reasonably conforms to all laws and health and fire regulations applicable thereto and is properly ventilated and supplied with separate and sufficient toilet arrangements for each sex and was and is a safe and proper place and building for a public dance hall.

Petitioner further represents that he has at all times carried on his said business in conformity with the laws of this State.

Petitioner further represents that the said premises are located outside of the corporate limits of the City of Lincoln, Illinois, and are situated in the County of Logan aforesaid.

Petitioner further represents that heretofore, to-wit, on the 28th day of August A. D. 1925 he duly made out, executed and verified by his oath the application to the County Board of the County of Logan in the State of Illinois to operate and maintain a dance hall, in the words following to-wit:

State of Illinois, County of Logan, ss.

The undersigned, W. H. Jones, hereby makes application to operate a dance hall and being first duly sworn, deposes in answer to the following interrogatories concerning said application:

Name, W. H. Jones. Address, Box 277, Lincoln, Illinois

Residence of Applicant, Sec. 5, 19-2, Chester Twp. Logan County, Illinois.

Duration of above residence. Seven years.

Place of Birth. Duncansville, Ohio.

Are you a naturalized citizen—

State time and place of such naturalization—

Have you ever been convicted of a felony or a misdemeanor, punishable under the laws of this state by a minimum imprisonment of six months or longer? No. Location of the place or building where the applicant intends to operate or maintain the Dance Hall. N. W. 1-4 Sec. 5, Town 19, Range 2, Logan County, Ill.

The applicant further establishes that he is a person of good moral character and that the place or building where the dance hall is to be operated or maintained, reasonably conforms to all laws and health and fire regulations applicable thereto and is properly ventilated and is supplied with separate and sufficient toilet arrangements for each sex and is a safe and proper place for a public dance hall.

W. H. Jones.

Signature of applicant.

Subscribed and sworn to before me this 28th

David S. Skinner,

County Clerk.

elected to stand by its general demurrer; and thereupon the court ordered a writ of mandamus to compel the appellant to issue the license. This appeal is prosecuted from the order overruling the general demurrer and the order for the writ of mandamus.

The first question arising on appeal concerns the legal sufficiency of the petition; and it will be noticed that the averments in the petition concerning the place and building where the dance hall is to be operated are, that the same "reasonably conforms to all laws, and health and fire regulations applicable thereto, and is properly ventilated, and is supplied with separate and sufficient toilet arrangements for each sex; and was and is a safe and proper place and building for a public dance hall;" practically the same statements in reference to the place and building were made to inform the Board of the propriety of the place, and the safety of the building to be used as a public dance hall, appear in the application for the license. It is clear that the averments in the petition, namely, "that the building reasonably conformed to all laws and health and fire regulations applicable thereto," and that it is "properly ventilated," and that the 'toilet arrangements are sufficient for each sex,' are merely the conclusions of the pleader; no facts are stated to show that these conclusions are justified. Neither the application to the Board, nor the petition for mandamus state, what the character or construction of the building is; nor what kind of material used in its construction, nor the dimensions of the building; what kind of doors or windows are in the building; nor their size; or number; nor where situated; nor the number and character of exits from the building; nor is it stated in the petition what the toilet arrangements are which are provided for each sex, which it is asserted are sufficient to comply with the law. The facts bearing on the matters referred to were vitally important; and should have been brought to the attention of the County Board, so that the Board could intelligently exercise its discretion under the Act referred to, about the granting or refusal to grant

obeyed to stand by its
general demurrer; and thereupon the court ordered a
writ of mandamus to compel the appellant to issue
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that the toilet arrangements are sufficient for each
sex," are merely the conclusions of the pleader; no facts
are stated to show that these conclusions are justified.
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[illegible]
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nor their size; or number; nor where situated; nor the
number and character of exits from the building; nor
is it stated [illegible]
[illegible] would
[illegible] the Dance Hall, so that the Board could
[illegible] exercise its discretion under the Act re-
[illegible] about the granting or refusal to grant

the license applied for. The demurrer filed to the petition for mandamus did not admit the correctness of the conclusions of the pleader referred to; a demurrer admits only facts which are well pleaded. A petition for mandamus should show upon its face a clear right to the relief; and every fact which is material thereto must be distinctly set forth. **La Valle v. Soucy** 96 Ill. 467; **People v. Jasper County** 186 Ill. App. 527; **Scott v. City of Chicago** 205 Ill. 281; **People v. Busse** 247 Ill. 333; **People v. School Directors** 139 Ill. 620.

For the reasons stated, we are of opinion that the petition was legally insufficient as a basis for ordering the writ of mandamus; and that the general demurrer should have been sustained. The order awarding the writ is therefore reversed, and the cause is remanded, with directions to sustain the demurrer to the petition.

Reversed and remanded with directions.

5657

243 I.A. 641

General No. 7979 Agenda 15

April Term, A. D. 1926
Cecil L. Walker, Appellant.
vs.
Lorita M. Walker, Appellee.
Appeal from Macon.

NIEHAUS, J.

This is an appeal from the order of the circuit court of Macon County, dismissing the bill of complaint of Cecil L. Walker, the appellant, praying for a divorce and the custody of three minor children. The bill charges the wife, Lorita M. Walker, with adultery. While the proof conclusively shows, that the appellee had been guilty of the acts of adultery after her marriage with the appellant, it is the contention of the appellee, that after she had voluntarily confessed her illicit acts to her husband, he forgave her, and thereafter resumed his sexual and marital relations with her; and that the violations of her marriage vows were therefore condoned. The matter of condonation constituted the main controverted question of fact in the case. The trial court heard the evidence, and the witnesses concerning this contested matter, and found that there was condonation; and that therefore the appellant was not entitled to a decree for divorce and dismissed the bill accordingly.

It is contended that the Court erred in finding that appellee's delinquencies were condoned. In this kind of a case, the finding of the court on a question of fact is not usually disturbed by a court of review, unless such finding is clearly against the weight of the evidence. **Dyas v. Dyas** 231 Ill. 367; **Meneta v. Hoffman** 249 Ill. 56; **Day v. Wright** 233 Ill. 218; **Beatty v. Hood** 229 Ill. 562. Considering the evidence in the record on this question, this Court would not be justified in saying that the finding of the Court was against the weight of the evidence; on the contrary the evidence appears to warrant the finding.

Attention is called to the fact that the Court appointed a guardian adlitem, Sua Sponte, for the appellee, who acted for her in that capacity. Such appointment under the circumstances of this case was not erroneous. **Rhodes** v. **Rhodes** 43 Ill. 239. Nor was there any legal impropriety in the allowance of fees to the solicitor who was appointed as guardian ad litem, for the services rendered by him as guardian ad litem; and such fees were properly taxed as part of the costs of the litigation.

For the reasons stated, the decree is affirmed.

Affirmed.

General No. 7993 Agenda 27

April Term, A. D. 1926

243 I.A. 641

Joe Hays, Appellee.

vs.

The National Life and Accident Insurance Company, a Corporation, Appellant.

Appeal from Vermilion.

NIEHAUS, J.

In this case the appellee, Joe Hays, recovered a judgment for $72.00 in the circuit court of Vermilion county, against the appellant. The National Life and Accident Insurance Company. The right of recovery is based upon accidental injuries alleged to have been sustained by the appellee while working at his occupation of mining coal; and it is claimed that by the injuries received, he was disabled from performing the usual work incident to his occupation. This appeal is prosecuted from the judgment; and various errors are assigned for reversal of the judgment.

It is contended, that the court erred in excluding the testimony of Dr. W. H. White, who was called as a witness for the appellant, and as an expert roentologist. The testimony of Dr. White was based entirely on what was shown by certain x-ray plates, which had been taken of appellee's spine in the lumbar and dorsal regions of the body. There was no evidence offered however, to show the correctness and verity of the x-ray plates in picturing the physical conditions involved; nor were the plates in evidence. We are of opinion that under these circumstances, the evidence was properly excluded.

Error is also assigned in the giving of the following instructions:

1. The jury are instructed that in this case, if you believe from a preponderance of the evidence that the plaintiff while insured by the defendant company received an injury which rendered him unable to follow

(General No. 7903) Agenda 27

April Term, A. D. 1929 2 4 3

Joe Hays, Appellee.

vs.

The National Life and Accident Insurance Company, a Corporation, Appellant.

Appeal from Vermilion.

SHERIDAN, J.

In this case the appellee, Joe Hays, recovered a judgment for $72.00 in the circuit court of Vermilion county, against the appellant, The National Life and Accident Insurance Company. The right of recovery based upon accidental injuries alleged to have been sustained by the appellee while working at his occupation of mining coal; and it is claimed that by the injuries received, he was disabled from performing the usual work incident to his occupation. This appeal is prosecuted from the judgment; and various errors are assigned for reversal of the judgment.

It is contended, that the court erred in excluding the testimony of Dr. W. H. White, who was called a witness for the appellant, and is an expert regarding the condition of the

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tion

his regular employment, and that from the terms of contract the defendant company became liable to pay to the insured the amount of indemnity stipulated therein, then it would be the duty of the jury to find the issues in favor of the plaintiff.

2. The jury are instructed that where an insurance company relies upon a misrepresentation by the insured as a ground for right to avoid liability on the policy, it must appear from the evidence that the misstatement, if any, was material to the risk, and that the company was lead to issue the policy on account of such misstatements, and if the jury believe that the company knew of the previous injury of the plaintiff in this case, and issued the policy which they seek to avoid, with full knowledge of the facts, then such misstatements, if any, are no defense in this suit.

3. The jury are instructed that it is admitted by the defense in this case that the policies of insurance in evidence were regularly issued and delivered by the company to the plaintiff, that they were in force and premiums were fully paid thereon up to the time of filing suit, and that the said policies of insurance express the full terms of contract between the company and the plaintiff; and you are further instructed that if you believe from the evidence in this case by a preponderance thereof, that the last policy issued, numbered 246930, was issued and delivered by the defendant company by their agent, such delivery was a waiver of any representation of the insured. provided the agent then had full knowledge of all the facts about which such representations were made; and the receipt of the premiums by the agents of the defendant, The National Life and Accident Insurance Company, was an acknowledgment that the plaintiff was entitled to all of the benefits under the policy provided that the agent of the company knew at the time of the delivery of policy that the insured had suffered a previous injury and delivered the policy with such knowledge, then such delivery would be a waiver of representations, if any were made by defendant, with reference to such injury.

It is apparent that the first instruction given bases the appellee's right of recovery upon the mere fact, that the appellee received an injury which rendered him unable to follow a regular employment, and leaves it to the jury to determine whether under the terms of the policy the appellant was liable. It is the province of the court to construe the terms of a contract, and to fix the extent of the legal liability under a certain state of facts, if proven; and it is for the jury to determine whether such state of facts has been proven. It was error therefore to submit to the jury the determination of appellant's liability resulting from a construction of the terms of the policy. The second and third instructions were given with reference to the questions of waiver of the defenses which the

his regular employment, and that from the terms of contract the defendant company became liable to pay to the insured the amount of indemnity stipulated therein, then it would be the duty of the jury to find the issues in favor of the plaintiff.

2. The jury are instructed that where an insurance company relies upon a misrepresentation by the insured as a ground for right to avoid liability on the policy, it must appear from the evidence that the misstatement, if any, was material to the risk, and that the company was lead to issue the policy on account of such misstatements, and if the jury believe that the company knew of the previous injury of the plaintiff in this case, and issued the policy which they seek to avoid, with full knowledge of the facts, then such misstatements, if any, are no defense in this suit.

3. The jury are instructed that it is admitted by the defense in this case that the policies of insurance in evidence were regularly issued and delivered by the company to the plaintiff, that they were in force and premiums were fully paid thereon up to the time of filing suit, and that the said policies of insurance express the full terms of contract between the company and the plaintiff; and you are further instructed that if you believe from the evidence in this case by a preponderance thereof, that the last policy issued, numbered 240230, was issued and delivered by the defendant company by their agent, such delivery was a waiver of any representation of the insured, provided the agent then had full knowledge of all the facts about which such representations were made; and the receipt of the premiums by the agents of the defendant. The National Life and Accident Insurance Company, was an acknowledgment that the plaintiff was entitled to all of the benefits under the policy provided that the agent of the company knew at the time of the delivery of policy that the insured had suffered a previous injury and delivered the policy with such knowledge, then such delivery would be a waiver of representations, if any were made by defendant, with reference to such injury.

It is apparent that the first instruction given bases the appellee's right of recovery upon the mere fact, that the appellee received an injury which rendered him unable to follow a regular employment, and leaves it to the jury to determine whether under the terms of the policy the appellant was liable. It is the province of the court to construe the terms of a contract, and to fix the extent of the legal liability under a certain state of facts, if proven; and it is for the jury to determine whether such state of facts has been proven. It was error therefore to submit to the jury the determination of appellant's liability resulting from a construction of the terms of the policy. The second and third instructions were given with

to the questions of waiver of the defenses

appellant claims to have; and which are based on alleged misstatements by the appellee in the application he made for the insurance; and the principal alleged misstatements relied upon by the appellant, as a defense, was that the appellee at the time he made the application for the second policy, stated, that he was no longer afflicted by any past injury to his back. This element of defense is not included in the instruction; hence the jury might naturally be mislead into believing that only the one fact of the previous injury suffered by the appellee before his application for the second policy, was involved in the question of waiver, and that they were not required to consider the question of whether he was still suffering from such injuries at the time of his application for the second policy. The instructions referred to were erroneous for the reasons indicated; and the judgment is therefore reversed and the cause remanded.

Reversed and remanded.

56584

243 I.A. 641

General No. 7997 Agenda 30

April Term, A. D. 1926

E. A. Richardson, Appellant.

vs.

Harry Riley, Appellee.

Appeal from Shelby

NIEHAUS, J.

In this case a judgment was entered by confession in the circuit court of Shelby county. The abstract does not show however, who obtained the judgment, nor against whom it was rendered. By inference we are enabled to conclude, that the judgment was in favor of the appellant, E. A. Richardson, and against the appellee, Harry Riley; but, the amount of the judgment does not clearly appear. The original judgment entered by confession was apparently afterwards opened on motion of the appellee, Harry Riley; and he was given leave by the court to plead in defense thereto, and pleaded the general issue. Following the opening of the judgment, the abstract shows that a number of motions and orders of the court pertaining to the controversy were made, but the abstract does not set out what the orders were; nor it does not appear from the abstract what the orders had reference to; nor does it show how they affected the pleadings, or the matters in controversy. It appears from the abstract, that the case was referred to a referee, who took testimony concerning the controverted matters and made a report; and that both the appellant and the appellee filed exceptions to the referee's report. Afterwards there was a trial by jury, and a verdict. It is not clear from the face of the abstract just what issues were involved in the controversy, nor what issues were submitted to the jury; the abstract shows that the jury rendered a verdict, but it does not show what finding the jury made. From what has been stated, it is apparent that the abstract does not comply with the requirements of Rule 22 of this Court; and that the appellant

(General No. 7907) Agenda 30

April Term, A. D. 1926

... A. Nicholson, Appellant,

vs.

Harry Riley, Appellee.

Appeal from Shelby

SIBERA, J.

In this case a judgment was entered by confession in the circuit court of Shelby county. The abstract does not show however, who obtained the judgment, nor against whom it was rendered. By inference we are enabled to conclude, that the judgment was in favor of the appellant, E. A. Nicholson, and against the appellee, Harry Riley; but, the amount of the judgment does not clearly appear. The original judgment entered by confession was apparently after wards opened on motion of the appellee, Harry Riley: and he was given leave by the court to plead in defense thereto, and pleaded the general issue. Following the opening of the judgment, the abstract shows that

number of motions and orders of the court pertaining to the controversy were made, but the abstract does not set out what the orders were: nor it does not appear from the abstract what the orders had reference to; nor does it show how they affected the pleadings, or the matters in controversy. It appears from the abstract, that the case was referred to a referee, who took testimony concerning the controverted matters and made a report; and that both the appellant and the appellee filed exceptions to the referee's report. Afterwards there was a trial by jury, and a verdict. It is not clear from the face of the abstract just what issues were involved in the controversy, nor what issues were submitted to the jury: the abstract shows that the jury rendered a verdict, but it does not show what finding the jury made. From what has been stated, it is apparent that the abstract does not comply with the requirements of Rule 22 of this Court:

that the appellant

therefore is not entitled to a review of the proceedings on appeal. For the reasons stated, the judgment is affirmed.

Affirmed.

359

243 I.A. 641

General No. 8001 Agenda 33

April Term, A. D. 1926

J. B. Highmore, Appellant.

vs.

Lulu Highmore, Appellee.

Appeal from Sangamon.

NIEHAUS, J.

In this case the appellee, Lulu Highmore, filed a bill for separate maintenance in the circuit court of Sangamon county, against her husband, J. B. Highmore, the appellant. After the issues were settled, the case was referred to the Master, who after hearing the evidence, made a report finding that the appellee was living separate and apart from her husband; but that this separation was not without her fault; and that she was not entitled to claim separate maintenance. The court on hearing the cause sustained an exception to the finding of the Master; and rendered a decree requiring the appellant to pay $30.00 per month for the separate maintenance of the appellee. An appeal is prosecuted from this decree.

The controverted question involved in this appeal is practically one of fact. The evidence in the record clearly establishes, that the separation in this case was by the husband, and from the wife. The record discloses that the parties had their home in the village of Rochester, near Springfield, and became involved in a quarrel about their son, who had suddenly left home, and the employment of his father, whose business was selling horses, mules and stock. Apparently the son left in consequences of some unkind treatment on the part of his father, and this became the subject of the quarrel between the parties. The quarrel resulted in appellant's removing his personal belongings and himself from the home, and under circumstances which clearly indicated that he meant such removal to become a permanent separation from his wife. The evidence fails to show that the wife, either in her

con-

duct towards her husband or otherwise, gave him just cause or a legal justification for withdrawing from the home, or to separate himself from his wife. Under these circumstances it was encumbent on the husband to justify such separation. **Winterberg v. Winterberg** 177 Ill. App. 493. The finding of the court, therefore, that the appellee was entitled to separate maintenance, was warranted and is sustained by the evidence. The decree is affirmed.

Affirmed.

54 60a

243 I.A. 641

General No. 7966 Agenda No. 44

April Term, A. D. 1926

The People of the State of Illinois, Defendant in Error,

vs.

F. E. Uttinger, Plaintiff in Error

Error to the County Court of Piatt County

SHURTLEFF, J.

Information was filed by the State's Attorney of Piatt County against plaintiff in error in the county court under the Prohibition Act, charging plaintiff in error with violating the act under four separate counts. The **first count** charged possession of intoxicating liquor with the intent to violate the Prohibition Act; the **second count** charged the unlawful transportation of intoxicating liquors without having a permit from the Attorney General of the State of Illinois to then and there sell intoxicating liquors; the **third count** charged an unlawful sale of intoxicating liquors, and the **fourth count** charged plaintiff in error "willfully and unlawfully in violation of the Illinois Prohibition Act, certain intoxicating liquor did then and there possess, the said possession * * * being prohibited and unlawful and * * * not being then and there for nonbeverage purposes, and not being * * * for sacramental purposes, and not being * * * in the possession of him, * * * by a physician for medicinal purposes, and the said F. E. Uttinger not then and there having a permit from the Attorney General, etc. * * * to then and there possess," etc.

Plaintiff in error moved to quash the information and each count thereof, which was overrueld by the court. There was a trial by jury and a verdict of guilty on each count of the information.

There was a motion for a new trial, whereupon the State's Attorney entered a nolle prosse as to the first count in the information. The court overruled the motion for a new trial and a motion in arrest of judgment and thereupon entered judgment, assessing a fine against tiff in error was committed to the state farm at Vanof suit upon the second count; of one hundred dollars upon the third count and upon the fourth count plaintiff in error was committed to the state farm at Vandalia for a period of sixty days. Thereafter the fine upon the third count was remitted.

Plaintiff in error urges that the second and fourth counts in the information do not charge an offense under the Prohibition Act. The second count attempts to charge an "unlawful transportation" of intoxicating liquor without having a permit "to sell." This count is conceded to be insufficient and cannot be sustained on the ground of a typographical error. **People v. Weiss,** 168 Ill. App. 502. As to the fourth count, what was said in **People v. Tate,** 316 Ill. 57, and more particularly elucidated in **The People v. Peiscz,** 226 Ill. App. 363, renders it conclusive that the fourth count of said information is insufficient. The count does not charge that plaintiff in error had the liquor in his possession "for use in violating" the Prohibition Act as required by section 28 of the Act, nor does it negative the exception set out in section 40 of the Act.

In **People v. Peiscz et al, supra,** it was held: "The information in this case does not attempt to charge any offense in the language of the statute. Only that portion of such language is used which refers to possession. The charge admits the language of the statute, which makes the purpose and intent to violate some provision of the act a necessary element of the crime of unlawfully possessing intoxicating liquor."

Under section 40 of the Act, liquors lawfully acquired may be possessed in the owner's dwelling for the use of himself and his **bona fide** guests.

Plaintiff in error points out other assignments of errors upon the record, the most glaring of which is the giving of the People's third instruction as to the possession of intoxicating liquor being **prima facie** evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of the Act. This instruction, based presumably upon the first and fourth counts of the information, had no place in the case. There was no testimony in the case that plaintiff in error had the possession of any intoxicating liquors other than the liquor involved in the sales to the witness Clifton, as testified to by him, all of which testimony was contradicted by plaintiff in error. (**People v. Tate**, 316 Ill. 59.)

Other errors are pointed out which, upon a retrial of the cause, will doubtless be corrected.

For failure to quash the second and fourth counts in the information and the giving of People's third instruction the judgment of the County Court of Piatt County is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and Remanded.

plaintiff in error. (People v. Tate, 3th Ill. 50.)

566a

Gen. No. 7999 Agenda 31

April Term, A. D. 1926

In Re Estate of John E. This, Deceased.

Appeal from Circuit Court of McLean County

Per Curiam:

The record comes to this court by appeal to reverse an order of the Circuit Court dismissing a petition of petitioners mentioned therein. The petition was filed in the Probate Court of McLean County for a citation against J. P. Arnold, executor of the last will and testament of John E. This, deceased. That court entered an order dismissing the petition and petitioners appealed to the Circuit Court as shown by the order printed in the abstract. The Circuit Court heard evidence and entered an order dismissing the petition and petitioners further appeal to this court.

There are circumstances warranting such a petition. But whether they were made the basis of the proceeding by petition in this case we cannot say, because the petition is not abstracted. The rules of this court, as of all courts of appeal, require a printed abstract, which shall contain all the pleadings, as well as the evidence and orders or decrees entered by the lower court. The petition filed being the basis of jurisdiction, as well as of rights asserted, must be set out in the abstract. If not, on appeal the judgment, order or decree appealed from will be affirmed. The reason for affirmance is, enough is not presented to disclose error, under the rules governing review. The transcript of the record required to be brought here is essential to confer jurisdiction. But for the purpose of hearing we look only to the abstract which must disclose everything necessary to review.

We have carefully read the abstract and if the petition was based on a state of facts that seems by it to be indicated, the Circuit Court could have done nothing but dismiss it. The ground of the petition is only conjectural and does not authorize us to affirm the order upon the facts. But we do affirm it because no error is made to appear by the

April Term, A. D. 1929

In Re Estate of John B. This, Deceased.

Appeal from Circuit Court of Malcom County

Per Curiam:

The record comes to this court by appeal to reverse an order of the Circuit Court dismissing a petition of petitioners mentioned therein. The petition was filed in the Probate Court of Malcom County for a citation against A. P. Arnold, executor of the last will and testament of John B. This, deceased. That court entered an order dismissing the petition and petitioners appealed to the Circuit Court as shown by the order printed in the abstract. The Circuit Court heard evidence and entered an order dismissing the petition and petitioners further appeal to this court.

There are circumstances warranting such a petition. But whether they were made the basis of the proceeding by petition in this case we cannot say, because the petition is not abstracted. The rules of this court, as of all courts of appeal, require a printed abstract, which shall contain all the pleadings, as well as the evidence and orders or decrees entered by the lower court. The petition filed being the basis of jurisdiction, as well as of rights asserted, must be set out in the abstract. If not, on appeal the judgment, order or decree appealed from will be affirmed. The reason for affirmance is, enough is not presented to disclose error, under the rules governing review. The transcript of the record required to be brought here is essential to confer jurisdiction. But for the purpose of hearing we look only to the abstract which must disclose everything necessary to review.

We have carefully read the abstract and if the petition was based on a state of facts that seems by it to be indicated, the Circuit Court could have done nothing but dismiss it. The ground of the petition is [illegible]

abstract as required by the rules of this court.

Affirmed.

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5726

243 I.A. 642

General No. 8009 Agenda 34

April Term, 1926

People of the State of Illinois, Defendant in Error.

vs.

Bert Bowman, Plaintiff in Error.

Error to the County Court of Morgan County.

CROW, P. J.:

The plaintiff in error, hereafter called defendant, was prosecuted upon an information filed in the county court of Morgan County charging him with selling intoxicating liquor in violation of the statute. The original information consisted of one count. During the progress of the trial the prosecution asked and obtained leave to file an amended information. The amended information consisted of two counts, designated in the record as first and second count. The first charged that defendant sold whiskey; the second that he sold "certain intoxicating liquor, towit, certain spirituous liquor containing more than one half of one per cent by volume of alcohol and fit for use for beverage purposes." The jury found defendant guilty as charged in the second count of the information. Upon overruling motion for new trial the court rendered judgment on the verdict imposing sentences of 80 days in the Illinois State Farm and a fine of $150. To reverse the judgment the record is brought to this court by writ of error.

In the argument of defendant he especially calls attention to the statement preceding it and says the facts there stated "almost alone makes a reversal mandatory. During the trial when it was found the proof did not correspond with the allegation of the information, the people took leave to amend their information. Instead of amending they filed a new information in two counts making no reference of any kind to the original. The court in

its instructions made no reference to the original information so as to distinguish them. There is no amended information in this record—there are two informations."

The abstract, made of course by counsel for plaintiff in error, recites: "Motion and leave to amend information. Motion to quash amended information. Amended information in two counts: First count charging that Bert Bowman, on etc.—(setting forth the charge). Second count charging that defendant on etc.—(setting forth the charge)." So counsel is in error when he says in the statement preceding the brief that no reference was ever made by the court to the amended information. On page 20 of the abstract, after the general instructions and in connection with them, though preceding that as to the form of the verdict, are the following instructions:

> "24. The court instructs the jury that if you find the defendant guilty, you do not fix the punishment."
>
> "25. The court instructs the jury that the information as amended in this case consists of two counts. And the court instructs the jury that the first count of the information charges that on the twenty-ninth day of August, A. D. 1925 at and in the county of Morgan in the state of Illinois, the defendant Bert Bowman did wilfully sell etc. (charging the sale of whiskey)."
>
> "The second count of the information charges that on the twenty-ninth day of August, A. D. 1925 at ***** did unlawfully sell ***** certain spirituous liquor," setting forth the charge in due form. The court then instructed the jury that if they found defendant guilty in manner and form charged in the information, or either count of it. the form may be:
>
> "We the jury find the defendant guilty in manner and form as charged in the——— count of the information." This was followed by the words in parenthesis:" (filling in the blank with the word properly designating the count upon which you find the defendant guilty)."

The full statement of the record shows the jury could not have been misled by the instruction and that they knew by information in the legal way they were trying defendant on the charge of selling intoxicating liquor. The chemist testifying as to the nature of the liquor said he would not call it whiskey but dilute alcohol. It was probably this testimony that caused the amended information to be filed, one count charging the sale of whiskey and the other spirituous liquor.

As in the case of **People v. Coffman**, No. 8010, decided at

the present term of this court, a search warrant seems to have been employed and a one dollar bill found in possession of defendant. It was given by Jones a deputy sheriff, to Walter Craddock with which to purchase liquor. It was given to Jones by Strawn another deputy. Before delivery, its number, "N-9069831-B", was written on slips of paper and the slips kept by Jones and Strawn. It remained in the sheriff's office until the trial. In a few hours after the liquor was purchased from defendant he was arrested and a one dollar bill with identical number was found in his possession with eighteen or twenty other dollar bills. After taking the identified bill from defendant another was given to him in its stead. As in the **Coffman** case, **supra**, defendant accounted for the possession of the bill consistent with his innocence. He had repairs made on his automobile that day, the repairs costing one dollar. He handed the repair man a ten dollar bill and received nine one dollar bills in change. That does not account well for the identified bill.

Without reviewing the evidence more fully, it is enough to say the conclusion is inevitable that defendant received the identified dollar bill. The only alternative is that the sheriff and deputy sheriffs and Craddock are guilty of perjury or are mistaken. If he got it as Craddock says his possession of it can be accounted for as the price of intoxicating liquor sold by him. He had it with others in his pocket when arrested. The identity of the bottle containing the liquor is preserved by the same unimpeached evidence—a label placed on it when delivered by Craddock, and each step of its handling, through the chemist back to the sheriff and to the court before the jury. Defendant's guilt does not rest upon the testimony of Craddock alone, as contended. The search warrant is not in the record, as contended. The search warrant is not in the record, at least not in the abstract, and we will not search the record to reverse, though we may, as often held by the Supreme Court, to affirm it.

Seventeen instructions were given on behalf of defendant and they covered every possible question in the case.

No reversable error appearing in the record the judgment is affirmed.

Affirmed.

5727a

243 I.A. 642

Gen. No. 8010 Agenda 1

April Term, 1926

The People of the State of Illinois, Defendant in Error.

vs.

William Coffman, Plaintiff in Error

Error to the County Court of Morgan County

CROW, P. J.

Plaintiff in error, hereafter called defendant, was convicted on a charge of selling intoxicating liquor in violation of the statute. After motions for new trial and in arrest of judgment had been overruled, he was sentenced to pay a fine of $150 and costs and to be committed to the Illinois State Farm for sixty days. To reverse the judgment and sentence the writ of error is prosecuted.

Mulligan, a witness for the people, testified he bought a pint bottle containing liquor from defendant and paid him three dollars for it and gave it to Arthur Reeve. Defendant denied that he sold that liquor or any liquor to Mulligan; that "Exhibit A", the bottle containing the liquor, was never in his possession and that he never had a bottle like that in Jacksonville. It is contended that the conviction rests upon unsupported testimony of Mulligan. On motion for new trial the usual grounds were alleged and they are substantially repeated in the assignment of errors, ten in number.

The principal ground urged for a reversal of the judgment is that the evidence is not sufficient to support it. Incidentally it is urged that the court erred in admitting evidence of a five dollar bill delivered to Mulligan with which to purchase the liquor and which was found in the possession of defendant a short time after the liquor was purchased. We have read the evidence as abstracted and cannot assent to the proposition that the conviction rests upon the narrow basis contended for. If

Mulligan's testimony is true, plaintiff in error was rightly convicted. If it was corroborated by credible evidence or by facts and circumstances proved at the trial, and no prejudicial error intervened at the trial the judgment will not be reversed unless upon a full examination of it the court cannot say it was insufficient to warrant it.

Mulligan's testimony was that he purchased the bottle containing the alleged intoxicating liquor from defendant, paying him three dollars for it; that he put it in his pocket and delivered it to Arthur Reeve. He did not remember the day, but it was within a year. On cross examination he said there was no label on the bottle when he handed it to Reeve. He knew it was the bottle because he saw Reeve put something on it while he was there and supposed it was paper. Saw no writing on it. There was no mark of identification on the bottle; he had seen lots of them. He had never gone out for the sheriff before, and got no pay for it; the sheriff just asked him to get it. He was an ice man and knew defendant.

Reeve was a deputy sheriff. The bottle, exhibit A, he got from Mulligan and turned over to Wright, who was sheriff, at the jail. Until that time it had been in his posesssion. Wright testified he received the bottle from Reeve and delivered it to Burch a deputy sheriff, who in turn delivered it to Leavenworth, a professor of chemistry at Illinois College. Wright testified he had drunk, smelled and tasted whiskey; that he took a drink of the contents of exhibit A and that it was whiskey, and that it was fit for beverage purposes. On cross examination it was developed that the bottle was delivered to him the night of and after the arrest of defendant and that he personally arrested him at his house. He found liquor on the floor of defendant's house, and some liquor in other bottles, but found no bottle of liquor. There were a "lot of empties that had been poured out". Some bottles had "just a little in the bottom of it." Knew it was liquor because he smelled it. A jug was thrown out of the house. There were a lot

of gallon jugs but nothing in them and that was true of several bottles. Did not pour the contents all in one bottle and bring it away. Found a lot of pint bottles of the same sort as exhibit A. Professor Leavenworth analyzed the contents of the bottle exhibit A. It contained 43.25 per cent of alcohol by volume.

In addition to the foregoing evidence, Reeve and Henry Strawn another deputy, testified to the use of a five dollar bill in the purchase of the liquor from defendant. Reeve gave Mulligan a five dollar bill on the night of the purchase, at about ten o'clock, for the purpose of purchasing liquor. Before delivering it to Mulligan he made a memorandum on a piece of paper, "H-28697853 A Series of 1914." That was the number of the bill. When officers went to defendant's house about 1:30 a. m. with a search warrant, a five dollar bill with the same serial number was found in his trousers pocket with other bills. Strawn corroborated Reeve in every particular as to what took place at the house. The officers were denied admission by defendant to the house after they had told him who they were and that they had a warrant to search his premises. He told the officers he got the money as wages for his work at the clothes factory.

Defendant denies the facts stated by Mulligan. He admitted that he had the five dollar bill in his possession that night. He said, "I know where I got it. I had between fifteen and twenty-five on me that night. I got the five dollar bill in question from American Legion home in a pool game. I got it between ten and eleven that night. I did not get the five dollar bill from the man Mulligan who testified here. Had no transactions of any kind or character with him." On cross examination he did not deny that the bill was taken from his pocket, nor that it was his money.

The unusual fullness of the evidence taken from the abstract, shows that the conviction of defendant does not rest alone upon the testimony of Mulligan. Unless we assume what we

have not been asked to assume, that defendant is entirely reliable and all of those for the prosecution are entirely unreliable, we must conclude that the verdict and judgment are abundantly supported. If it be granted, though we find nothing tangible to warrant it, that Mulligan was not reliable and trustworthy, yet polluted as that source of information might be, it is corroborated by unimpeached evidence. The five dollar bill is a link that binds the entire story of defendant's guilt beyond any doubt. While the evidence is not in large compass, it would not be possible for six witnesses to concoct a story and maintain it with the cogency of that pointing to the guilt of defendant. It is true as has been said, "circumstance and strong imputation lead direct to the door of truth." The cases of **People v. York,** 262 Ill. 620 (634) and **Campbell v. People,** 159 id. 9, cited by counsel are inapplicable upon the state of the record in this case.

It is said in argument that it was not fair to defendant to admit evidence of the search of his house and what was there found. It is further said the officers broke into his house many hours after the alleged sale took place, that while they possibly had a search warrant, there is no charge of possession of liquor in this case and it was, therefore error to permit evidence of the "inflammatory story." On this point it is enough to say generally, if a seizure was made without lawful authority a motion should have been interposed to suppress the things seized. They could not then be used if suppressed, or legally used if the motion had been denied. But the record presents the strange condition that the scope of the search warrant and its purpose were inquired into orally and without objection by anyone. The objection is not now made on that ground, but if it were it is too late. The question was one of competence of the evidence which must be raised at the trial. This court only reviews errors alleged to have been committed at the trial where objections were

made and exceptions saved. The search, concededly by warrant, revealed that the house was a place where intoxicating liquor was possessed and handled, unless we rely upon the unsupported story of defendant against that of the men conducting the search. Nothing in the case justifies such extreme and unusual procedure. In this connection, the evidence of the possession of the five dollar bill is not admissable on the ground that it is **par res gestae** as counsel seems to think. It was the fruit of crime found in possession of defendant soon after the crime was committed. It is not unlike the possession of stolen property recently after a theft and which is evidence of the crime by the one in whose possession it is found, unless in the record is found a satisfactory explanation of the apparently guilty possession consistent with innocence. Defendant attempted to make that explanation but it was not in the least convincing. At best it only tends to show that the offense was committed somewhere other than at the house where it was found. The place of the crime was, so far as the record shows, immaterial. Whether he sold and received pay for it at the club or at his house, is immaterial.

We find nothing that justifies a reversal of the judgment and it is therefore affirmed.

Affirmed.

243 I.A. 642

General No. 7991 Agenda 45

April Term, 1926

Glenn W. Ward, Appellant.

vs.

Oren Easton, Administrater of the Estate of Lewis Easton, Deceased, Appellee.

Appeal from Cumberland.

NIEHAUS, J.

This suit was commenced in the circuit court of Cumberland county by Oren Easton as administrator of the Estate of Lewis Easton deceased, for the benefit of the next of kin of the deceased, and against the appellant Glenn Ward, to recover damages for wrongfully causing the death of the deceased. The declaration charges that the deceased was fatally injured about nine o'clock in the evening of July 24, 1924, on a drive way leading into the Union Auto Company's garage in the village of Greenup, by the appellant Glenn Ward, who, it is alleged, was negligent in the operation of his automobile, in driving it up the drive way and across the side walk into the entrance of the garage referred to. The declaration also charges that the appellant wilfully and wantonly drove his car along the drive way and across the side walk mentioned with conscious indifference of the consequence, as well as and at a rate of speed greater than was reasonable and proper, having regard to the traffic and the use of the way; and so as to endanger life or limb of other persons.

Lewis Easton was the son of the appellee, and at the time of the fatal injury, a boy about ten years of age, and on the evening in question just prior to his injury, he was on the side walk near the entrance to the garage referred to, in company with two other boys; and was rolling his hoop along the sidewalk. Charles Nees, one of the boys mentioned, was about twelve years of age; and was a witness in the case. He testified about the occurrence that resulted

in the injury and death of the deceased, as follows: "I was at the Union Auto Company's garage with George Loomis and Lewis Easton, and we had come from the town library. Just prior to the time Lewis Easton was injured, I was standing next to the drive way, and George Loomis was about fifteen feet north of the drive way. I was north of the drive way. Lewis Easton was rolling a hoop on a public sidewalk and was coming from the south toward the north. Glenn Ward came from the north on Kentucky street. He came down the pavement from the north and ran into the driveway. Lewis Easton was coming from the south and came up to the drive way. Glenn Ward turned in the drive way and hit and knocked him in the garage, and ran over him with the front and back wheel. The car ran over his stomach." He also testified, that the appellant Glenn Ward did not sound any horn or give any warning when he drove into the drive way and crossed the sidewalk; and that "when Glenn Ward started to turn into this drive way, Lewis Easton was three or four feet from the doorway on the south side." At the conclusion of the evidence, at the instance of the appellant, the jury were instructed to make a special finding, namely, "Did the defendant at the time of the accident which resulted in the death of Lewis Easton, act wantonly, wilfully and with reckless disregard of the rights of the deceased?" And the jury found that he did. The trial resulted in a verdict and judgment in favor of the appellee for $1500.00. This appeal is prosecuted from the judgment.

Several grounds are urged for reversal of the judgment. It is insisted, that the verdict and special finding, that the defendant was guilty of wanton and wilful conduct, is contrary to the evidence. It is sufficient to say with reference to this contention, that there was no motion made by the appellant to set aside the special finding of fact in the court below; and it is the well settled rule that under these circumstances the appellant is conclusively bound by the special finding; and cannot

in the
injury and death of the deceased, as follows: "I was
at the Union Auto Company's garage with George
Loomis and Lewis Easton, and we had come from the
town library. Just prior to the time Lewis Easton was
ed, I was standing next to the drive way, and
George Loomis was about fifteen feet north of the
drive way. I was north of the drive way. Lewis Eas-
ton was rolling a hoop on a public sidewalk and was
coming from the south toward the north. Glenn Ward
came from the north on Kentucky street. He came
down the pavement from the north and ran into the
[illegible] Lewis Easton was coming from the south
me up to the drive way. Glenn Ward turned in
the drive way and hit and knocked him in the gutter,
and ran over him with the front and back wheel. The
car ran over his stomach." He also testified, that the
plaintiff Glenn Ward did not sound any horn or give
warning when he drove into the drive way and
[illegible]
of the rights of the deceased." And
found that he did. The trial resulted in a
and judgment in favor of the appellee for
This appeal is prosecuted from the judg-
[illegible]
t. It is insisted, that he verdict and special
that the defendant was guilty of wanton and
ondant, is contrary to the evidence. It is suffi-
with reference to this contention, that

question it on appeal. **Brimie v. Belden Mfg. Co.** 287 Ill. 15. **Ideal Electric Co. v. Penn Mutual Life Ins. Co.** 189 Ill. App. 331. Viewing the appellant's contentions from this point of view, it is needless to discuss or determine the questions raised by appellant's brief concerning alleged matters of contributory negligence.

It is contended, that the court erred in excluding the opinion of the witness A. T. Brady, concerning the speed of the appellant's car when he ran up the drive way. In view of the fact that Brady testified, that he did not see appellant's car until it had struck the boy, it seems apparent that he was not qualified to have an opinion about the speed at which the car was driven up the drive way to the point of its impact with deceased, and we conclude therefore, that the court did not err in not allowing him to express the opinion. It is also contended that the court erred in holding that the appellant was incompetent as a witness to testify in his own behalf. The appellant was not competent as a witness to testify generally in this proceeding because the adverse party sues as administrator, under Sec. 2 Chap. 51 Cahill's Revised Statutes. There was no showing made to the court, that appellant expected to make some proof which would have been competent under any of the exceptions provided for in the Act referred to. We find no error in this feature of the case. Questions of error are also raised concerning several instructions given for the appellee. We do not deem it necessary for the purposes of this opinion to discuss in detail the criticisms of the instructions made by appellant; some of the criticisms are justified and sustained by authority; but the errors pointed out are not of such substantial character as to be reversible. The record does not disclose any reversible error; and the judgment is therefore affirmed.

Judgment Affirmed.

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5724a

243 I.A. 642

Gen. No. 8011 Agenda No. 2

April Term, 1926

The People of the State of Illinois, Defendant in Error,

vs.

Shirley Pierson, Plaintiff in Error.

Writ of Error to Circuit Court of Pike County

SHURTLEFF, J.

Plaintiff in error was convicted in the Circuit Court of Pike County upon two counts in an indictment charging the illegal sale of intoxicating liquor, and has brought the record, by writ of error, to this court for review.

Plaintiff in error contends that the evidence is insufficient to warrant a conviction upon either count. The abstract furnished contains no index and violates Rule 22 of this court and the judgment of conviction might well be affirmed upon that ground. We have, however, at considerable labor, examined the record and the testimony to determine whether an injustice has been done to plaintiff in error by this conviction.

Various witnesses testified that they had purchased intoxicating liquor from plaintiff in error, but some of them had grave doubt if the occurrence was within eighteen months prior to the indictment in this case. There can be little question but that the sale of intoxicating liquor to W. S. Binns on the evening before Thanksgiving, 1923, was properly proven and warranted the jury in finding plaintiff in error guilty upon one count. Binns called plaintiff in errors telephone, either by name or number. It was the witness's best

judgment that plaintiff in error answered the phone. Witness told plaintiff in error: "I would like to have 'a half' delivered to me; no one but me." The reply was, "all right" or "later on." Later in the same day a gallon of almost white, intoxicating liquor was delivered to the witness by some one other than plaintiff in error, to whom the witness paid ten or twelve dollars. This testimony is not denied.

Another sale is predicated upon the testimony of one Ervin and Robert A. Williams to the said Williams in the fall of 1923. Ervin testified: I was with Robert A. Williams. I don't know what year. I saw the defendant and Robert A. Williams right on the street. When I first saw defendant he was at home. Myself and Williams went to his home. Williams stood on the sidewalk and I went over and told Mr. Pierson that Williams wanted to see him. Defendant told me that he was going out to the place in the car and for us to walk down the street and he would pick us up. We walked down the street and Pierson come along and we got in. We went out in the country on the Eldora road. We stopped along there by the Sam Williams farm, about one and a half miles from town. I was setting in the car. I can't recall whether both of them got out, may be only one got out, anyway, there was some hooch produced that was in the weeds. If they both got out, I guess Mr. Pierson picked it up, undoubtedly he did. Mr. Williams gave me a drink and I handed it back. I did not know there was whiskey in the weeds. It was in the weeds alongside of the road. It was in a fruit jar. It tasted like corn whiskey. I have tasted corn whiskey; this was the same. This was between 15th October, 1923, and 15th April, 1925. In my mind they both got out, Mr. Pierson and Mr. Williams, at least I thought they both got out of the car and walked off that way (indicating), walked along the weeds and finally stopped in the weeds. It was all

done in a minute or two. Then Bob, I think it was Mr. Williams, I went along to get a drink and I took a drink and I don't know whether they brought the rest to town or not. I never got no more.

Williams testified that he had bought intoxicating liquor from plaintiff in error and states that he might have bought some between October 15, 1923, and April 15, 1925. He was not positive. He testifies to the same occurence that the witness Ervin testified to, but stated that he thought that occurrence was in the spring of 1923, which would be more than eighteen months prior to the finding of the indictment. The testimony is uncontradicted that it occurred when the weeds were tall. Williams further testified that he might have had possession of liquor bought of plaintiff in error within a week prior to Thanksgiving, 1923. He says: "I could not say. I usually have some, can't remember."

While the testimony of both Ervin and Williams is evasive and they were unwilling witnesses, the testimony of each is that intoxicating liquor was obtained from plaintiff in error at the occurrence in question, the witness Williams placing the time in the spring of 1923 but the witness Ervin in one statement saying positively that it was after October 15, 1923. There was no testimony showing that Williams paid for the liquor at the time in question, but Williams did testify that he had purchased liquor before this time from the plaintiff in error. Ervin testified that the liquor tasted like corn whiskey "hooch" and stated that it would kick you if you drank enough of it.

Another witness, Hobbs, superintendent of streets of the City of Pittsfield and in charge of the City Yard, testified in regard to having a half gallon of intoxicating liquors at the yard

and stated that he got it from plaintiff in error and paid him four dollars for it. Witness kept it in the pump house. He stated that he drank a part of it and that it was intoxicating. The witness did not state the exact time he purchased this liquor but he had testified before the grand jury twice and stated that both testimonies before the grand jury applied to the same time. As to whether he did not testify before the grand jury that he purchased this liquor from plaintiff in error and had it at this city yard in 1924, the witness first stated that he did not remember whether it was in 1924 or not, and later said he might possibly so have testified.

While the Hobbs testimony does not fix a date to bring the sale within eighteen months prior to the finding of the indictment, there is positive testimony as to the Williams transaction that it occurred between October 15, 1923, and April 15, 1924, and if the jury believed this testimony to be true, beyond a reasonable doubt, it would warrant a conviction upon the second count. We can not see that any injustice has been done plaintiff in error by this conviction, and for failure to comply with the rules of this court in filing abstract, the judgment of the Circuit Court of Pike County is affirmed.

Affirmed.

STATE OF ILLINOIS.
APPELLATE COURT
4TH. DISTRICT.

MARCH TERM, A. D. 1926.

5594

243 I.A. 643

TERM NO. 40. AG. NO.31.

PLEASANT BURNETT, et al, Appellees,	:	
VS.	:	APPEAL FROM
WOOD RIVER LUMBER & SUPPLY CO., et al, (Wood River Lumber & Supply Co., Appellant.)	:	MADISON CIRCUIT COURT.

OPINION by BARRY, J.

Appellees, Pleasant Burnett and wife, filed a bill in which they averred that their note for $1375.00 to the Wood River Lumber & Supply Company was secured by a mortgage upon certain real estate and that the Home Building & Loan Association held a prior mortgage upon the same premises; that in July 1924, a judgment was procured against them by the Wood River Lumber & Supply Company in the Circuit Court of Madison County for the sum of $162.40, that being the interest upon the said note for $1375.00; that the several parties entered into an agreement with the Chicago Title & Trust Company whereby that company agreed to take over and purchase the notes held by the Wood River Lumber & Supply Company and by the said Loan Association; that pursuant to said agreement the Burnetts executed a new note and mortgage in favor of the Chicago Title & Trust Company in an amount sufficient to satisfy and dis-

charge the two mortgages aforesaid; that the said Chicago Title & Trust Company forwarded to the First State & Savings Bank of Wood River said sum of money where it was held in trust by said bank for the use and benefit of the two mortgagees; that said money was received by said bank on July 12, 1922, and that the balance thereof, after the payment of the Loan Association mortgage, remained on deposit to the account and credit and for the use of the Wood River Lumber & Supply Company until November 1922, when said bank became insolvent and closed its doors.

The bill further avers that said Wood River Lumber & Supply Company agreed with said Burnetts that when they had negotiated a loan from the said Chicago Title & Trust Company and the money was received by the said bank to the account of said Wood River Lumber & Supply Company, that the latter company would at once cancel its note and mortgage but that altho said money was received by said bank and was held by it to the account and for the use of said Wood River Lumber & Supply Company, yet it had failed and neglected to obtain its money from said bank, but suffered and permitted the same to remain in said account until the bank became insolvent and the same was lost. The bill prayed that the Wood River Lumber & Supply Company be restrained from collecting its said judgment and that the said note held by it against the Burnetts be surrendered and canceled. Issues were joined and a decree rendered in accordance with the prayer of the bill.

There is no evidence tending to prove the averments of the bill that the Chicago Title & Trust Company agreed to take over and purchase the said mortgage notes. Mr. Burnett testified that about the first of January 1922, he told Mr. Reis, secretary of

the Wood River Lumber & Supply Company, that he was thinking of getting a loan at the bank that would be large enough to take up both mortgages and that Mr. Reis said they would be pleased to have their money. He further testified that about a week later he met Mr. Reis at the First State & Savings Bank, at Mr. Barnett's desk, and that they talked the matter over about getting a loan; that Mr. Barnett, who was an employee of the bank, told Mr. Reis that he was going to let Mr. Burnett have a loan of $4,000.00 to take up his mortgages, That Mr. Reis then said to Mr. Barnett:- "Whenever this man (Burnett) gets his papers ready then I will get my money of you, I will have nothing more to do with this matter and not look to him any farther for any pay." There is no further evidence to support the averment of the bill that the Wood River Lumber & Supply Cpmpany agreed with the Burnetts that when they had negotiated a loan and the money was received by the bank to the account of said Wood River Lumber & Supply Company, that it would at once cancel its note and mortgage. We find no evidence in the record to the effect that any of the proceeds of the loan from the Chicago Title & Trust Company were ever placed in the bank to the credit or account of the Wood River Lumber & Supply Company. In fact it appears that it was placed on deposit in a general real estate loan account and that Mr. Barnett was the only person authorized to draw checks against that account. We are of the opinion that the averments of the bill were not proven.

It appears from the averments of the bill that about two years after the alleged agreement was made the Wood River Lumber & Supply Company sued the Burnetts and recovered a judgment for $162.40, being the interest then due on the $1375.00

mortgage note. Counsel for the Burnetts say that the theory of their bill is that the note was paid by reason of the alleged agreement in 1922. The defense of payment could have been made in the suit brought to recover the interest on the note, Hofmann vs. Burris, 210 Ill. 587. In their brief and argument counsel say, that they attempted to make that defense in the former suit but were not permitted to do so. There is nothing in the record to show that this is true, but even if there were such a showing a court of equity will not sit as a court for the correction of errors committed by a court of law, Clark vs. Chandler, 286 Ill. 180. If the court erroneously refused to permit the presentation of the defense of payment the Burnetts should have appealed from the judgment instead of appealing to a court of equity. So far as the record shows the defense of payment may have been presented and passed upon and decided against the Burnetts in the action at law. At any rate it is a defense which should have been presented at that time.

If the note was paid in 1922 by reason of the alleged agreement the Wood River Lumber & Supply Company was not entitled to recover interest on the note in 1924. The court could not have properly rendered a judgment for the interest if the note had been previously paid. The question as to whether the note was paid in 1922 was directly involved, or could have been made an issue, and is now res judicata. Former adjudication may be considered by a court of equity, altho not averred in the answer, where the fact fully appears from the bill itself, Hofmann vs. Burris, supra.

There is no averment in the bill indicating that the judgment was procured through fraud, accident or mistake, and no excuse is averred or proven for a failure to make the defense of payment in the suit to recover interest on the note. It is no ground for relief in equity against a judgment at law that the judgment is wrong in law or fact, or both, if the complaining party had an opportunity to make his defense at law and omitted to do so, Martin vs. Mc Call, 247 Ill. 484. A court of equity will grant relief when a judgment is procured by fraud, accident or mistake, but no aid will be extended merely for errors intervening in the progress of the cause or entry of the judgment, Central S.&G. Exchange, vs. Pine Tree Lumber Company, 140 App. 471; Italiana vs. Papa, 204 App. 343. If the court erroneously refused to allow the Burnetts to offer their defense of payment when sued for the interest their remedy was by an appeal from the judgment and not by an appeal to a court of equity. The decree is reversed and the cause remanded with directions to dismiss the bill for want of equity.

Abstract

REVERSED AND REMANDED
WITH DIRECTIONS.

STATE OF ILLINOIS.
APPELLATE COURT
4TH. DISTRICT.
MARCH TERM, A. D. 1926.

TERM NO. 44. AG. NO. 17.

243 I.A. 643

EMIL N. KIEFER, et al, Appellees,	:	APPEAL FROM
VS.	:	ST. CLARE
CATHERINE M. REIS, et al. Appellants.	:	CIRCUIT COURT.

Barry, J. - Appellants, who are husband and wife, employed appellee, Kiefer, to erect a dwelling on the wife's real estate. It was understood that Kiefer would purchase the necessary lumber and mill work from the East St. Louis Lumber Company, of which the husband was manager. The husband superintended the construction of the building as his wife's agent. When built the possession of the house was delivered to appellants. Kiefer filed a bill to foreclose a machanics lien for the balance alleged to be due under the original contract and for extras and made the States Savings & Loan Association a defendant. averring that it held a mortgage on the premises but that the lien thereof was subject to the lien of the complainant. Appellants were also made defendants to the bill. The Loan Association set up in its answer that before it made the loan to appellants, Kiefer delivered to it an affidavit in which he represented that all bills for labor and materials used in the construction of the house had been paid and that by reason there of he waived his right to a prior lien; that under a provision in the mortgage it was entitled to, and asked the Court to tax, a reasonable solicitor's fee as costs.

2431.A. C. 3

Appellants.

Appellants answered that they were not indebted to Kiefer in any sum; that he had been fully paid and his bill should be dismissed for want of equity; that the contract was not as set forth in the bill; that the extras were not furnished to the amount claimed; that Kiefer failed to comply with his contract; that the house was not built in a workman-like manner; that appellants had paid to sub-contractors and had assumed the payment ofaccounts for labor and materials to an amount greater than that due to Kiefer. Issues were joined and the cause referred to the Master in Chancery who reported the evidence with his conclusions of law and fact. Appellants filed objections and exceptions which were overruled and a decree was rendered in favor of Kiefer for $5027.64.

Appellants averred, in their answer, that the East St. Louis Lumber Company was a sub-contractor and had furnished labor and materials used in the construction of the house to the amount of $5476.11 and that with the consent of Kiefer and all parties concerned appellants assumed the payment of that bill. The Master and the Court refused to allow the appellants credit therefor, and one of the errors assigned is that the Court erred in not allowing appellants credit for the amount they paid to the East St. Louis Lumber Company. It will be observed that appellants did not claim, in their answer, that they had actually paid said bill, but simply that they had assumed it. A defendant cannot avail himself of any matter of defense not stated in his answer, even though it appears in the evidence, Millard vs. Millard, 221 Ill. 86.

If appellants simply assumed the bill of the East St. Louis Lumber Company that would not release Kiefer from liability therefor unless the Lumber Company agreed to look solely to appellants for payment thereof,. Fish vs. Glover, 154 Ill. 88-91. In other words, Kiefer would not be relieved from liability unless a novation was relied upon in the answer

and established by the proof. The averments of the answer were insufficient to show a novation. In order to effect a novation there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed, 20 R.C.L. 366. It is essential to a novation that all parties to the original contract consent to the substitution of the new one, Walker vs. Wood, 170 Ill. 463.

Kiefer denied that he consented to the change. Mrs. Reis was the owner of the premises and one of the parties indebted to Kiefer. There is no evidence that she consented to the arrangement. Her husband was acting as her agent in looking after the construction of the building and he was also agent for the Lumber Company. He says that with the consent of Kiefer he assumed Kiefer's debt to the Lumber Company by crediting Kiefer on the books of the company for the amount of the bill and by charging the said amount to himself. There is no competent evidence to show that any other officer of the Lumber Company agreed to that arrangement or that the Lumber Company agreed to look solely to the husband for the payment of its bill. Mr. Reis, as agent for his wife, and also as agent for the Lumber Company, could not make a valid and binding agreement in that regard, 20 R.C.L. 362; Kirchman vs. Standard Coal Co., 112 Iowa, 668; 84 N.W. 939.

Appellants did not claim that they actually paid the bill of the Lumber Company and they have failed to prove a novation. It follows, necessarily, that the Court did not err in refusing to allow them credit for the amount of said bill.

Kiefer's original bid for the construction of the house was $8647.00, but he averred and testified that Mr. Reis agreed, before he made the bid, that if he was the lowest bidder, the would pay him $500.00 more than his bid. This was denied by Reis, but Kiefer produced a slip of paper bearing figures made by Reis which tended strongly to corroborate Kiefer's claim.

We would not be warranted in holding that the Court erred in its finding in favor of Kiefer in that regard.

Appellants insist that the Court erred in taxing a solicitor's fee of $400.00 in favor of the Loan Association as a part of the costs; that such fee should not be included in the lien of Kiefer as a part of the costs, and that Kiefer should not be authorized to sell the property to pay said fee; that Kiefer brought the Loan Association into the case and failed in his claim of priority and that the Court should have apportioned the costs so that Kiefer would be required to pay an equitable portion thereof. The only error assigned in regard to the matters aforesaid is that the Court erred in allowing a solicitor's fee of $400.00 to be taxed as costs against appellants. We are not at liberty to consider alleged errors that are not assigned on the record.

The mortgagor may, by a provision of the mortgage, bind himself not only to indemnify the mortgagee forsolicitors fees in case of foreclosure, but also for any such fees paid out or incurred by the mortgagee in any collateral litigation to which he may be a party by reason of his relation to the debt or the mortgage securing the same, Huber vs. Brown, 243 Ill. 274. In the case at bar appellants expressly agreed in their mortgage to the Loan Association, that if the latter should be made a party to any suit or proceeding at law or in equity, the Court in which the proceedings were brought should fix a reasonable solicitor's fee and tax the same in favor of the mortgagee as a part of the costs to be paid by appellants, and that the premises should be held liable for the payment of the same. In the Huber case, supra, the mortgagee was made a defendant to a mechanics lien proceeding in which it was averred that the lien of the mortgage was subject to that of the complainant, and the complainant failed to establish its claim, as in the case at bar. Under a provision similar to the one in question the Court held it was proper to allow the mortgagee a solicitor's fee in the mechanics lien proceeding to be paid by

the mortgagor. Appellants have no just cause to complain of the allowance of the solicitor's fee to the mortgagee in accordance with their contract.

It is argued that the Court erred in allowing Kiefer $203.61 for liability insurance and contractors fees; that it has been held that a contractor is not entitled to a lien for liability insurance and that as there is nothing to show how much of the said sum was for insurance the decree should be reversed. It is sufficient to say that if the Court made such an allowance appellants have failed to show it in their abstract. Counsel for Kiefer deny that such an allowance was made. We cannot presume that the Court allowed improper items, nor go to the record in search of errors upon which to reverse a decree.

It is finally suggested that appellants claim they are entitled to various credits on account of changes in the plans, and for the reason that the house was not constructed in a workmanlike manner, and that the defects materially lessen the value of the building. Nothing more is said as to the various credits to which they claim they are entitled because of changes in the plans. As to alleged defects in construction they say:- "As a reading of the abstract of the testimony on this a question by the Court is necessary for a proper understanding of the case, we will not go into detail in discussing these different items". They then state that they placed seven witnesses upon the stand who testified it would take from $1800.00 to $2500.00 to remedy the defects. They summarise eleven of the principal defects and say that there are others. They do not, however, point out any of the testimony bearing upon any of the alleged defects but say that the Master and the Court allowed but $326.00 on account thereof. They conclude their argument on this branch of the case by saying:- "On these questions we will merely ask the Court to read the abstract of the testimony and determine whether or not appellants are not entitled to a greater allowance than that made by the Master".

The abstract of the evidence purports to refer to the pages of the transcript of the record where it may be found but the pages of the record are not numbered in so far as they pertain to the evidence. The inference is that the abstract was prepared from the Master's report of the evidence. The abstract indicates that the evidence bearing upon the alleged defects in construction is scattered through 44 pages thereof and 345 pages of the record. It is apparent that the abstract is much condensed. If we read the abstract and search out the evidence bearing upon the question it may be necessary to go to the record which is not paged. If we numbered the pages of the record they may not correspond with the pages thereof as shown in the abstract.

If appellants were seriously contending that the Court should have allowed a greater sum for alleged defects in construction, they should have pointed out the testimony upon which they base their contention instead of asking the Court to read the abstract of the record not paged and determine whether or not they were entitled to greater allowance on account thereof. Trial Courts are presumed to have followed the law and the evidence and if an appellant thinks the Court has erred it is his duty to point out the error to the reviewing Court instead of asking that Court to search for and determine whether errors have intervened.

As no reversible error has been pointed out the decree is affirmed.

Abstract

AFFIRMED.

Term No. 1 Agenda No. 1

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

FILED
NOV 8 1926
ROBERT S. ROY
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MARCH TERM, A. D., 1926.

HARLAN STOCKTON, et al,
Defendants in Error.

vs.

TAMAROA LITTLE MUDDY COAL COMPANY and SAMUEL B. WEINBERGER,
Plaintiffs in Error.

Error to the Circuit Court of Perry County.

243 I.A. 643

Opinion by Boggs, P. J.

In January, 1922, defendants in error, Harlan Stockton and Gosper G. Stockton, their wives joining them, leased certain coal lands in Perry County to Samuel B. Weinberger, plaintiff in error. Weinberger was to pay 4 cents per ton as royalty for the merchantable mine run coal taken from said lands, with condition that a minimum of 25,000 tons be mined and paid for annually, and in case of failure to mine that amount as a minimum and to pay for the same within thirty days after it became due and within ten days after notice of default, the lease was to be forfeited. Weinberger subesquently assigned his interest in said lease to the Tamaroa Little Muddy Coal Company, and subscribed for 2524 shares of the capital stock of said corporation, at a par value of $50.00 per share. Weinberger paid $8,000 in cash and transferred certain coal lands to said corporation, valued by him at over $200,000, in payment for said stock.

The Tamaroa Little Muddy Coal Company operated said mines until it got into some financial difficulties, and failed to mine and pay for the minimum amount of coal provided for in said lease, and failed to pay its corporation tax for the year 1924. On February 10th, 1925, the Stocktons filed a bill asking that said lease be cancelled, and that the unpaid subscription of plaintiff in error to the capital stock of said corporation be made subject to the payment of the debts of the corporation.

Said bill avers the failure of Weinberger and his assignee, the Tamaroa Little Muddy Coal Company, to mine the minimum amount of coal provided in said lease, and a failure to pay the minimum sum of $1,000 therefor for the year 1924. The bill also alleges that the corporation owed the complainants the sum of $1,475 and interest, on a past due note payable to the Stocktons; also for certain materials furnished said corporation, for which a mechanic's lien claim had been filed; and for a bond of $1,000 issued by said cor-

poration, with accrued interest, together with the balance alleged to be due on said mining lease. The bill further charges that the value of the real estate and the mining lease assigned by Weinberger to said corporation was much less than the par value of the capital stock subscribed for by him, and that there was still due from Weinberger for said stock at least $108,200; that said corporation was then insolvent, and that the unpaid portion of the par value of the capital stock owing the corporation by Weinberger should be applied on the payment of the debts of the corporation. The bill also charges that the debts of the corporation were in excess of $100,000, while the assets were not to exceed $20,000; and asked for the appointment of a receiver.

A large number of creditors of said corporation joined in filing an intervening petition, setting forth the amount of their claims and asking that a receiver be appointed for said corporation, and that their petition be taken in conjunction with the original bill filed in said cause.

To said bill, plaintiff in error and the Tamaroa Little Muddy Coal Company filed separate answers. In his answer, plaintiff in error admitted the making of said lease to him; admitted the assigning of the same to the Tamaroa Little Muddy Coal Company; denied the violation of the terms of said lease; denied any information as to whether said lease had been cancelled; admitted the furnishing of certain materials by defendants in error, as alleged in said bill, but denied information with reference to the amount of the same, or as to whether any claim had been filed or as to whether defendants in error were entitled to a lien; admitted that he was a subscriber for 2524 shares of the capital stock of said coal company, and averred that he paid therefor $8,000 in cash and assigned to said corporation property in value in excess of $200,000. Disclaimed any knowledge or information as to the truth of the averment that defendants in error hold a note of $1,475 and a bond for $1,000 given by said corporation; disclaimed any knowledge as to whether the franchise tax had or had not been paid; denied the allegation that said corporation had been mismanaged by its officers.

As the Tamaroa Little Muddy Coal Company does not join in the writ of error in this case, it will not be necessary to specifically set forth their admissions, denials and averments in its answer, further than to say that said defendant denied that defendants in error were entitled to a mechanic's lien for materials furnished; averred that it had tendered to defendants in error the full amount owing to them on materials, and for the balance owing on said lease; denied mismanagement on the part of its officers, etc.

A trial was had in open court, and on the termination of said hearing the court found that defendants in error were entitled to the mechanic's lien claimed by them, and to a decree for the amount of the note and bond set forth in said bill, together with interest thereon to the date of the decree; and also found that the Tamaroa Little Muddy Coal Company and plaintiff in error were liable to defendants in error on a judgment theretofore taken against said parties in the sum of

$6,384.29, which together with the interest amounted to $6,856.70, and entered a decree against said parties for said last amount. The court also found that the real estate transferred by plaintiff in error Weinberger to the Tamaroa Little Muddy Coal Company did not exceed in value the sum of $60,000, which together with the $8,000 paid in cash made a total paid in in cash and property of $68,000; that plaintiff in error was still owing said corporation on the stock issued to him, in the sum of $126,200; that said corporation was insolvent; that it had not paid its franchise tax for the year 1924; that a warrant in the nature of an execution was issued to the sheriff of Perry County by the Secretary of State; that on May 4th, 1925, after this suit had been brought, said corporation paid said franchise tax and penalties, "and by appropriate proceedings was reinstated as a corporation in the State of Illinois." Two receivers were appointed by the court for said corporation. Other findings were made by the court, having to do with the rights of said intervening petitioners, but which, in view of our holdings in this case, it will not be necessary for us to refer to at this time. Samuel B. Weinberger is the only person prosecuting this writ of error, and the question for determination is, as to whether, so far as the record touching his interests in said cause is concerned, the same is sufficient to sustain the decree entered against him by the trial court.

It is first contended by plaintiff in error that the bill does not state a right of action against him under the corporation statute as it existed at the time said bill was filed, and that, even though it be conceded that the allegations of the bill are sufficient, that the proof offered in support of the same does not warrant said decree.

The general corporation act of 1919 (Cahill's Stat. chap. 32, sec. 51) provides:

"Stockholders shall not be held liable for the debts of a corporation (incorporated under the law of this State) because of any unpaid portion of stock liability, until the corporation has been adjudged bankrupt, or an execution upon a judgment or decree of a court of record for the payment of money, after demand made by the officer, has been returned 'no property found' or has remained unsatisfied for ten days after such demand, or the corporation has dissolved or ceased doing business, leaving debts unpaid."

Section 52: "After such adjucation of bankruptcy, or after the execution has been so returned, or has remained unsatisfied for more than ten days, after demand made, or after dissolution or cessation of business leaving debts unpaid, any creditor may bring suit in equity, in any court having general jurisdiction in the county within which the principal office of the corporation is located, against all persons who are liable in any way for the debts of the corporation, by joining the corporation in such suit. Each stockholder may be required to pay his *pro rata* share of such debts and liabilities, to the extent of the unpaid portion of the stock, after exhausting the assets of such corporation. If any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall

be divided among all of the remaining solvent stockholders to the extent of their then unpaid stock liability."

The allegations of said bill, relied on as a basis for said decree, are: "that since its organization, said corporation has been mismanaged by Samuel B. Weinberger and its other officers, and has become insolvent because of such mismanagement; that the corporation has practically ceased business, and that by reason of its mismanagement and the dereliction of its officers, the State of Illinois has forfeited its charter; that the attorney general is now about to bring proceedings to oust said corporation from its corporate franchise; that the corporation is in default in the payment of its franchise tax for the year 1924, and the secretary of state of the State of Illinois, on the 10th day of November, 1924, issued a warrant directed to the sheriff of Perry County, directing said sheriff to collect from said corporation the sum of $90 franchise tax, and penalties; which said warrant has the same effect as an execution against the property of said corporation; that the amount due from said corporation as shown by said warrant has remained unsatisfied for more than ten days after demand made,—and that said corporation is wholly insolvent."

While in June, 1919, prior to the passage of the sections of the statute above set forth, a creditor of an insolvent corporation might proceed in equity against its stockholders without any call being made by the corporation or the bankruptcy court, (*Edwards* v. *Challenger,* 245 Ill., 231-244), yet, as the statute now stands, before such bill can be maintained, one or the other of the following conditions must exist: (a) the corporation must have been adjudged bankrupt; (b) or an execution upon a judgment or decree of a court of record for the payment of money, after demand made by the officer, has been returned "no property found"; (c) or has remained unsatisfied for ten days after such demand; (d) or the corporation has dissolved or ceased doing business, leaving debts unpaid.

An examination of the bill discloses that there is no averment that said corporation has been declared bankrupt; nor is there an averment that an execution has been issued against said corporation and returned "no property fund"; nor is there an averment that an execution had been issued and a demand made and payment had not been made within ten days thereafter; nor does said bill aver that said corporation has ceased doing business or has been dissolved, leaving debts unpaid. Counsel for defendants in error practically concede that this is true, but insist that the averment that the corporation had practically ceased business is sufficient. We are of the opinion and hold that this averment does not amount to an averment that the corporation has ceased doing business. It is further insisted by counsel for defendants in error that the averment that the franchise tax had not been paid, and that a warrant had been issued therefor and that it had not been paid, is a sufficient averment to meet the requirements of the statute. Even though it be conceded that the warrant issued by the secretary of state should have the same effect under the statute as the issuance of an execution, an exam-

ination of the record discloses that there is no proof that a demand was made on the corporation under said warrant; so that the evidence does not support the bill as to said averment. The allegation of insolvency does not bring the bill within the provisions of the statute, so that averment will not aid the lack of the statutory averments. In connection with the averment of the insolvency of said corporation, the intervening petition filed by the creditors of said corporation contains the following: "That the market for coal is in such shape that it is almost impossible for an ordinary mine in southern Illinois to operate at a profit, but it is represented that if this property is held intact as one general mining plant, by means of a competent receiver, that within a year or a year and a half, there will be a general resumption of the coal business, so that this mine can be operated at a profit, and its debts be paid."

It is next contended that the finding of the court that the property turned over by plaintiff in error to said corporation, together with the cash payment, was worth only $68,000, is not supported by the evidence.

The evidence offered on the part of defendants in error, tending to show that said property was greatly over-valued, is not satisfactory. Neither is the evidence offered by plaintiff in error, to the effect that its value equaled or exceeded the amount owing by him for said corporation stock, satisfactory. Inasmuch as this case will have to be reversed, we will not further discuss the evidence in connection with the value of said property. The law is, that while stock may be paid for in property, it must be taken at its fair cash market value. *Farwell* v. *Great Western Telegraph Co.*, 161 Ill., 522-532; *Sprague* v. *National Bank of America*, 172 Ill., 149-169; *Gillett* v. *Chicago Title & Trust Co.*, 230 Ill., 373-408; *Dee Co.* v. *Proviso Coal Co.*, 290 Ill., 252-258; *Linden Bros.* v. *The Practical Electricity & Engineering Publishing Co., et al.*, 309 Ill., 132-136. Where a party conveying to a corporation property in payment for stock issued to him, is also heavily interested in the corporation and one of its managing officers, if the corporation becomes insolvent, as between him and creditors of the corporation, the burden is on such stockholder to show that the property turned over was of the fair cash market value placed upon the same by the corporate authorities when taken over in payment for said stock. *Dee Co.* v. *Proviso Coal Co.*, 212 Ill., App. 400-405; aff'd, 290 Ill.. 252-256.

It is also contended by plaintiff in error that, even though it be conceded that the averments of the bill are sufficient to authorize the filing of a bill of this character by a creditor, and even though it be conceded that the property turned over in payment for stock issued to him was over-valued (as contended by defendants in error) that the decree rendered against him in favor of The Murphy-Wall State Bank & Trust Company, is erroneous.

That claim is nowhere referred to specifically in the original bill. In the intervening petition it is referred to as a judgment, the averment being "that the defendant Tamaroa Little Muddy Coal Company, through its officers, became in-

debted to the Murphy-Wall State Bank & Trust Company in the approximate sum of $6,500, which debt has been reduced to a judgment and is now a judgment of record, unpaid, in the circuit court of Perry County." All the relief asked by said petition, so far as disclosed by the abstract of the record, is for the appointment of a receiver. In other words, no relief as asked against plaintiff in error. The judgment was not offered in evidence, and there is nothing in the pleadings or proof showing the date of the same. The court finds the date of the judgment to be March 17th, 1924, and that the same then was for $6,384.29, and that on May 28th, 1925, being a year, two months and one day later, the judgment with the interest thereon aggregated $6,856.70, being $100 in excess of the amount of said judgment and interest at the rate of 5c per annum from the date the court finds said judgment was rendered. It would therefore appear that the point urged by plaintiff in error against the decree in favor of the Murphy-Wall State Bank & Trust Company, is well taken, and that the court erred in this regard.

It is also contended that the evidence fails to support the decree rendered against plaintiff in error in favor of the Stocktons, for the reason that the note and bond referred to in the bill of complaint were not offered in evidence. In answer to this contention, counsel for the Stocktons insist that there was a stipulation waiving such proof. There is nothing specifically showing that counsel representing plaintiff in error was one of the counsel entering into said stipulation, but as this case is to be reversed, it is not very material at this time. On another hearing, that objection can be obviated. Even though it be held that the stipulation was entered into by counsel representing plaintiff in error, there is nothing in the pleadings or in the stipulation to show that the bond in question was due at that time, or the date of the same or the interest which said bond was bearing.

It is a fundamental rule of equity pleading that the allegations of a bill, the proof and the decree must correspond, and that the decree cannot give relief which the facts disclosed by the evidence would warrant, where there are no averments in the bill to which the evidence can apply. *Stearns* v. *Glos,* 235 Ill., 290; *Kelly* v. *Kelly,* 293 Ill., 169-173. It might be further observed that there is no proof whatever with reference to steps having been taken by the secretary of state to have the charter of the Tamaroa Little Muddy Coal Company forfeited.

For the reasons above set forth, the judgment and decree of the trial court will be reversed and the cause will be remanded for further proceedings not inconsistent with the opinion herein.

Reversed and remanded.

Not to be published in full

5596a

Term No. 2 Agenda No. 28

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

FILED
NOV 9 1926
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MARCH TERM, A. D., 1926.

FIRST NATIONAL BANK OF ANNA, ILLINOIS, a corporation, and MANGOLD-ALDEN CO., a corporation,
Appellants.
vs.
AGNES M. ROONEY, as administratrix of the estate of John I. Rooney, deceased,
Appellee.

243 I.A. 643

Appeal from the Union County Circuit Court.

Opinion by Boggs, P. J.

John I. Rooney died at Anna, Union County, Illinois, January 20th, 1917, intestate, leaving him surviving appellee, his widow, and seven children, three of whom were under eighteen years of age at the time of his death. Agnes M. Rooney, appellee herein, was appointed administratrix of his estate.

Prior to and at the time of his death, said deceased was the owner of five lots in Anna, Illinois, one of which lots was occupied as a homestead. The personal property was insufficient to pay his indebtedness, and a petition was filed in the county court of said county to sell said above described real estate to pay the indebtedness owing by said estate. Said real estate was sold for the sum of $2,500.00, which, together with certain goods and chattels, appraised at $103.75, was all of the assets of said estate, as shown by appellee's final report. Appellants filed a claim against said estate for $323.86, which was allowed by the county court as a sixth-class claim. The assets as shown by appellee's final report were insufficient to pay the sixth-class claims, the distributive shares of appellants as shown by said report being $128.20.

To said final report, appellants filed certain objections, as follows: First, that appellee failed to charge herself with $275.00 of assets belonging to said estate. The second objection was general. The third objection was to the amount of $473.10 claimed by appellee as the value of her homestead. The fourth objection was to the item of $236.00 for the value of the widow's dower interest in the premises sold. The fifth objection was to the item of $1,100.00 allowed appellee as her widow's award. The sixth objection was to the item of $118.00 for funeral expenses and $35.00 for medical attendance during the last illness of the deceased.

On hearing, the county court reduced the allowance for the widow's homestead from $473.10 to $432.70; the dower

interest from $236.00 to $216.35, and also sustained in toto the objection to the item of $35.00 for medical attendance. All other objections to said report were overruled. Appellants perfected an appeal to the circuit court, and on hearing in the circuit court, the objection was sustained to the item of $473.10 for the value of appellee's homestead, and to said item of $35.00 for medical attendance. All other objections before said court were overruled, and judgment was entered accordingly. From that judgment, appellants prosecute this appeal.

In the petition filed by appellee in the county court to sell real estate to pay debts, she makes the following allegation: "That there has come to her hands as such administratrix personal estate of decedent amounting to $378.75." In the statement of assets made a part of said petition as Exhibit A, she shows that said item is made up of personal property taken by her on her award, appraised at $103.75, and of: "amount, notes and accounts inventoried, doubtful, $275.00." It is the duty of appellee to collect said notes and accounts, if they are collectible. If said notes and accounts are not collectible, and the evidence should so show, then appellee would be entitled to file said notes and accounts in the county court for the benefit of said estate, and take credit therefor on her final report.

As to the item of $118.00 for funeral expenses, the only evidence in the record is to the effect that the total amount paid in settlement of the same was $104.00. Said credit should therefore be reduced accordingly.

It is also contended by appellants that the court erred in allowing the item of $216.35 for appellee's dower interest. We are of the opinion and hold that the court properly allowed said credit, as the evidence clearly establishes appellee's right thereto, and the amount, as fixed by the county court, is not shown to be excessive.

It is contended by counsel for appellants on the objection to the item of $1,100.00 for widow's award: 1, that the allowance made by the appraisers was never approved by the court. 2, that there is nothing to show that the allowance was paid over to the widow. 3, that the same should have been paid to her in quarterly installments.

On the proposition that the widow's award as allowed by the appraisers must be approved by the county court, we hold that this point is not well taken. While ordinarily it is the practice of county courts to approve the award made by the appraisers, this is not an absolute necessity, especially where, as in this case, no objection has been made to the amount so allowed. *Miller* v. *Miller,* 82 Ill., 463. On the second proposition, the widow in this case is the administratrix of the estate, and the funds belonging to said estate were in her hands, and it was therefore not necessary that she show that she as administratrix paid over to herself as widow the amount of her award, in order for her to have the benefit of the same. On the last proposition, we hold that the provision with reference to paying over the amount allowed for minor children in quarterly installments has reference to an estate where the widow is not the administratrix, as in this case.

Counsel for appellants contends that appellee abandoned

her homestead in the premises left by her deceased husband. It is not very material in this case as to whether or not appellee abandoned her homestead, for the reason that the circuit court disallowed the item claimed by her for her homestead. She did not appeal from this order of the court, and is therefore bound by the same. Appellants are therefore not in a position to make complaint in reference thereto.

It is further contended that said homestead interest was not sold in said proceedings, for the reason that the consent of the widow to the sale of her homestead and dower interest was not acknowledged. Counsel takes a double position in regard to this matter: first, that the homestead was abandoned, and next, that it was not sold. It was not necessary that the consent of the widow to the sale of her homestead and dower interest in said premises should be acknowledged. All that was necessary was that she file her consent in writing to the sale of the same, and this she did. We think that the record clearly shows that both the homestead and dower interests of appellee in the premises in question were sold under said petition to sell real estate to pay debts. *Merritt* v. *Merritt,* 97 Ill., 243; *Richards* v. *Trubey,* 250 Ill., 57.

Appellants are in no position to complain as to the sale of the real estate, for the reason that it is stated in their brief and argument that appellee "reported to the court that she had sold the property (real estate, which included the homestead) for $2,500, and that she had the money as assets of the estate; the court approved the report of sale; the purchaser is satisfied with what he got for his money; she has made her final report, charging herself with that amount; there is no objection made to that item."

Appellee filed no brief in this case, and under our rules we would have been authorized in reversing the case *pro forma.* However, we deemed best to consider the case on the merits.

For the reasons above set forth, the judgment is affirmed as to all of said items, except the item of $275.00 which appellee failed to account for in her final report as part of the assets of said estate; and as to the item of $118.00 for funeral expenses, which we hold should be reduced to $104.00 under the evidence in the record. As to these two items, said cause is reversed and remanded.

Affirmed in part and reversed in part, and remanded.

Not to be reported in full.

Term No. 32 Agenda No. 22

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

FILED
NOV 9 1926
Robert B. Roy
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MARCH TERM, A. D., 1926.

EARL D. ROBERTS,
Appellee,
vs.
EGYPTIAN TRANSPORTATION SYSTEM, a Corporation,
Appellant.

Appeal from the City Court of East St. Louis, Illinois.

243 I.A. 644

Opinion by Boggs, P. J.

Appellee obtained a judgment for $16,000 in the city court of East St. Louis against appellant, for injuries sustained in an automobile accident. To reverse said judgment, this appeal is prosecuted.

The declaration consists of three counts. The first count charges appellant with general negligence; the second, with operating its motor bus at a high and dangerous rate of speed; and the third, with failure to equip its motor bus with good and sufficient brakes. Each of said counts avers that appellee was in the exercise of ordinary care for his own safety, just prior to and at the time of the accident, and further charges that appellant's bus struck the automobile in which appellee was riding, with great force and violence, and threw him from said automobile, thereby causing the injuries for which this suit was instituted, alleging damages, etc. To said declaration, appellant filed a plea of the general issue, and a trial was had, resulting in a verdict and judgment as above set forth.

It is first contended by appellant that the verdict of the jury is against the manifest weight of the evidence. The undisputed facts disclose that at the time of the accident appellee was riding as a guest and passenger in a Studebaker touring car owned and driven by one George Yoxall. Appellee was sitting in the front seat, and between him and the driver was a small boy about eight years of age. In the back seat was appellee's wife, a Mr. and Mrs. Flack, and a small child. The automobile was traveling in an easterly direction, and had reached a point about six miles east of Nashville, when it collided with a motor bus belonging to appellant, carrying some sixteen passengers. It was about seven o'clock in the evening, and was dark and rainy. The side curtains on the automobile were up, except the curtain on the left of the driver, which had been removed, and the driver testified that he was watching the road ahead by looking out to the left of the windshield. The highway was an 18-foot concrete slab, and at the time of the accident was wet and slippery. At the place of the accident, a large furniture truck stood on the north half of the pavement, headed west. It was covered with a tarpaulin, and was burning dim lights in front. The motor bus turned out to the left side of the pavement to pass

said truck, as the automobile in which appellee was riding attempted to pass the truck on the right. The motor bus and the automobile came together with great force, and appellant was found after the collision under the front axle of the motor bus. The motor bus was standing after the accident with all four wheels off of the pavement on the south side. One of the front wheels was damaged by the impact with the automobile.

The evidence is conflicting as to the speed of the automobile and the speed of the motor bus just prior to and at the time of the accident. The witnesses on the part of appellant fixed the speed of the automobile at from 30 to 35 miles per hour. The witnesses on the part of appellee testified to the effect that said automobile was not exceeding a speed of 20 miles per hour at said time. The witnesses on the part of appellant fixed the speed of the motor bus at not to exceed 25 miles per hour just prior to and at the time of the accident, while the witnesses on the part of appellee fixed its speed at from 35 to 45 miles per hour at said time. All of the occupants of the automobile who testified stated that they did not see the motor bus until it turned out on the left side of the pavement to pass said truck, and that there was only an instant after seeing the motor bus before the collision; that the motor bus was proceeding diagonally across the pavement to the left when the collision occurred. The evidence fails to disclose that the driver of the motor bus sounded any horn or gave any signal before turning to the left to pass around the truck. The driver of the motor bus testified to the effect that he did not sound any warning. This witness also testified that he saw the stationary truck when he was about 100 yards from it, and that he pulled out slightly to the left side of the pavement, looking ahead, but did not see any automobile coming. He also stated that he turned completely to the left side of the pavement when about 30 feet from the truck; that he at once saw the dim lights of the automobile, and ran the motor bus off of the pavement on the left side, and that he did not strike the automobile until the bus had left the pavement.

It is contended on the part of counsel for appellant that inasmuch as the motor bus had passed to the south side of the pavement with all of its wheels off of the pavement, that there was ample room for the car in which appellee was riding to have passed between the motor bus and said truck, and that therefore the collision could not be said to have been the result of negligence on the part of appellant.

We do not deem this point well taken, in view of all of the testimony in the case, for if the testimony of the witnesses on the part of appellee is to be believed, they did not see the motor bus until just prior to the collision. In this connection George F. Yoxall, the driver of the automobile, testified: "The accident happened a little after 7 o'clock on the 26th day of September, 1925. It was driving east. We were driving about fifteen or twenty miles an hour within 150 or 200 feet of the truck which was sitting on the road; just as I got about opposite the front wheels of the truck this bus came around the other side and the bus hit us. The bus came all

the way over on the road. The bus was traveling about forty to forty-five miles an hour. When the bus came around it just missed the truck. I heard no warning whatever. The truck was standing still, to my left side. I was traveling on the right side of the black mark. When I saw the bus I tried to turn to the left; the bus caught me on the right side of the machine and it sprung the front door open. That threw Mr. Roberts out under the bus." Appellee and the other occupants of the automobile who testified, all testified that just prior to the accident in question, said automobile was being driven on the south side of the center line of said pavement.

We are of the opinion and hold that, in view of all the testimony in the record as to the speed of the automobile in which appellee was riding, and the speed of appellant's motor bus, the slippery condition of the pavement, the fact that the night was dark and rainy; that the verdict of the jury finding that appellee was in the exercise of ordinary care for his own safety, and that appellant through its servants was guilty of negligence in the operation of said motor bus, is not manifestly against the weight of the evidence. The court therefore did not err in refusing a new trial on that ground. *Chicago & J. Ry. Co.* v. *Patton,* 122 App., 174-177, aff'd 219 Ill., 214; *Eggman* v. *Nutter, et al,* 169 App., 116-120; *Finley* v. *Federal Ins. Co.,* 211 App., 66; *Field* v. *Ingersoll,* 288 App., 457-466; *Sinopoli* v. *Chicago Ry. Co.,* 233 App., 432-437.

It is next contended by appellant that the court erred in refusing to give the tenth and eleventh instructions offered by it on the trial of said cause. An examination of these instructions will disclose that so far as they state correct principles of law, they were covered by other instructions given on behalf of appellant. The court therefore did not err in refusing to give said instructions. *Bundy* v. *West,* 297 Ill., 238-242; *Klusemeier* v. *East St. Louis Bridge Co.,* 210 App., 536-537.

It is next contended by appellant that the verdict of the jury is excessive. The record discloses that appellee's chest was crushed, and that he sustained fourteen fractures of his ribs; that some of the broken ends of the ribs passed entirely through the lungs and into the soft tissues of the chest; that his lungs adhered in places to the chest wall; that the injured condition of his chest is permanent, and that his chest is permanently flattened. The record also discloses that the normal rate of the pulse-beat has been doubled by reason of said injury; that prior to said injury appellee was strong physically, and was earning approximately $2,500 per year. We are therefore unable to say that the jury in fixing the amount of appellee's damages was governed by prejudice and passion, and unless we are able to do so, we would not be warranted in setting the judgment aside on the ground that the verdict and judgment is excessive. *North Chicago Street Ry. Co.* v. *Ziegler,* 182 Ill., 9-12; *Crooks* v. *Tazewell Coal Co.,* 263 Ill., 343-352; *Cheatham* v. *East St. Louis Ry. Co.,* 206 App., 236-237.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full

Term No. 30 5398a Agenda No. 30

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

FILED
NOV 8 1926
Rebecca D. Reed
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MARCH TERM, A. D., 1926.

ALBERT KABURECK,
Appellee,
vs.
AUGUST KABURECK,
Appellant.

Appeal from St. Clair Circuit Court.

243 I.A. 644

Barry, J.—On December 9, 1915, appellee loaned his son, appellant the sum of One Thousand ($1,000.00) Dollars, for which appellant and his wife executed to appellee their note falling due in one year. On July 28, 1924, appellee brought this suit in assumpsit and in a special count averred that after the said note was delivered to him he turned it and another note of Five Hundred ($500.00) Dollars over to appellant for safe-keeping and to be returned to appellee upon his request; that he later requested appellant to return said notes, but he failed and refused to do so; that the notes are due and unpaid and are of the value of the face amounts thereof, etc. The appellant pleaded non-assumpsit and there was a verdict and judgment for One Thousand ($1,000.00) Dollars. The jury evidently found against appellee as to the alleged Five Hundred ($500.00) Dollar note.

This is not a suit to recover on notes, but is based on the theory the notes were delivered to appellant as bailee and he had converted them to his own use, and that appellee elected to waive the tort and sue in assumpsit for an alleged breach of the contract of bailment. The bill of particulars filed by appellee charged that appellant converted the $1,000.00 note to his own use. Appellee testified, on direct examination, that he kept the note as long as he was healthy, and when he felt kind of sick he thought it best to give it to some of his boys, so he took it to his daughter's and gave it to appellant and told him to take care of it until he got better when he would come and get it and put it in his box in the bank at Freeburg. In his testimony in chief he did not claim that he turned the note over to appellant at any other place than his daughter's home, and he fixed no date for that transaction. He further said, in chief, that he asked for the note about six months later and appellant told him George, another son of appellee, had bought the note. He also testified, in chief, that after he gave appellant the note at his daughter's home, he never saw it again until four or five months previous to the last trial of the cause when George showed it to him.

On cross-examination appellee made no reference to the alleged delivery of the note to appellant at the daughter's

home. He said he did not know when he gave the note to appellant; that he got kind of sick and took his papers and the note to Lawyer Becherer's office; that appellant and his brother George were there, and that he said to appellant: "Here, Gus, take these papers and notes and take care of them, and when I get better I will come for it and take it back."

Appellee testified, that he endorsed the note in blank at the law office of Oscar Becherer. At first he said he could not tell when he put his name thereon, but later stated that it may have been two years after the note was made. When asked on direct examination why he put his name on the back of the note he replied that he saw they wanted to cheat him out of the money; that he wanted to have it sold and that he told Lawyer Becherer to sell it. He testified on cross-examination that he had the note at the lawyer's office when he endorsed it. he was then asked where he got the note and if he had it in his possession at Becherer's office, and he replied: "No, Gus (Appellant) had the note and then I see him going kind of crooked." He then added that he did not know whether he had the note yet in his possession that day or whether appellant had it; that after he signed his name on the back of the note he told Becherer he should collect it. In the same connection he said: I guess I gave the note back to Gus. I am pretty sure, because I did not have it. I did not give it to George."

It is quite apparent that if appellee ever gave the note to appellant for safe-keeping, he was very much confused as to the time and place of the occurrence. It could not have been delivered to appellant at the daughter's home and again at the lawyer's office, if, after the first delivery appellee never saw it again until the first trial of this case. He says that he saw appellant was going kind of crooked and was trying to cheat him out of the money. That being true it is hard to understand why he should endorse the note and deliver it to appellant for safe-keeping. Lawyer Becherer testified that appellee never endorsed the note in his presence nor asked him to sell it.

Appellant testified that after the note was made his father took it with him; that the father married again in 1916 and soon after told appellant that he wanted his papers out of his possession and that appellant said: "Let's put them in a box;" that appellant got a box at the Belleville Savings Bank in his own name; that he kept one key and gave the other to his father; that he never saw the note after it was put in the box until the first trial of this case; that he never gave the note to George. He also testified that appellee told him in 1918 that he (appellee) had given the note to George. Appellee denied that appellant gave him a key to the box, or that he had access thereto, or that he had placed the note therein or had taken it therefrom.

George Kabureck testified that on June 8, 1918, he met appellee, by agreement, at the Belleville Savings Bank; that appellee then had the note and signed his name on the back thereof and gave it to the witness; that he took the note with him to Springfield and has had it ever since; that he had com-

plained to appellee that the latter had sold some land to appellant too cheaply, and that appellee gave him the note in question because of that fact. His testimony on the trial was at variance with his deposition, previously taken, on about every material point.

The state of the evidence was such as to require that the jury be accurately instructed. Appellee's first given instruction was as follows: "The court instructs the jury that if you find from a preponderance of the evidence in this case that the plaintiff Albert Kabureck gave the defendant August Kabureck two notes to keep for him and that said August Kabureck agreed to safely keep the notes, and if requested, would return them; but that when requested to return the said notes, or either of them, that he failed to return them or either of them and converted same to his own use, then the defendant August Kabureck, is liable for the face value of the notes so converted, and you should find the issues for the plaintiff. The court further instructs the jury that the mere possession of a note, even though it is endorsed in blank, does not of itself prove ownership of the same. It is necessary that proof be made that the endorser delivered the note to the possessor."

The giving of that instruction was reversible error because the statute expressly provides that where the instrument is no longer in the possession of the party whose signature appears there on, a valid and intentional delivery by him is presumed, until the contrary is proved, Cal. Ill. St. An. ch. 98, par. 36. Appellee had endorsed the note and it had been in the possession of his son, George, for a long time and the latter produced it upon the trial. If appellee were suing in trover, it would be necessary for him to prove that at the time of the alleged conversion he had the right of property in the note and also the possession or the right thereof, U. S. Y. & T. Co., v. Mallory, 157 Ill., 554. We know of no rule of law that would permit appellee to waive the tort and recover in assumpsit on a lesser degree of proof.

If appellee endorsed the note and delivered the same to his son George, he would not be entitled to recover in this case.

The judgment is reversed and the cause remanded.

Reversed and Remanded.

Not to be reported.

Term No. 35 Agenda No. 33

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

FILED
NOV 9 1926
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MARCH TERM, A. D., 1926.

P. H. SAUTER, et al.,
Defendants in Error,
vs.
DIMITRO KACALIEFF, et al.,
DIMITRO KACALIEFF,
Plaintiff in Error.

Error to City Court
of East St. Louis.

243 I.A. 644

Barry, J.—Caroline Renshaw was the owner of a building in East St. Louis, and on December 2, 1922, entered into a written contract whereby she agreed to sell and convey the same to George B. Kauffer. The purchase price was $11,000.00 and the contract recited that the purchaser had paid $500.00 and should pay $3,000.00 more by December 12, 1922, that he should assume the payment of a $6,000.00 mortgage on the premises and give the vendor a second mortgage for the balance of the purchase price. Kauffer was left into possession of the premises, upon the execution of the contract, and on December 30, 1922, he executed a lease of the second floor of the building to defendants in error, Beasley & Zulley, for the period of five (5) years from January 1, 1923. The undisputed evidence shows that Kauffer procured plaintiff in error to carry out his contract with Mrs. Renshaw and that the payments due Mrs. Renshaw under the contract of sale were made by plaintiff in error. Upon payment being made Mrs. Renshaw conveyed the premises to plaintiff in error instead of making a deed to Kauffer. Beasley & Zulley had been in possession of the second floor of the building for several years prior to the time Mrs. Renshaw sold the premises to Kauffer, and they continued in possession thereof from thence hitherto. At the time plaintiff in error obtained his deed from Mrs. Renshaw he placed a mortgage upon the premises for $10,000.00 and at least a portion of the proceeds thereof was used by him in paying the purchase price which Kauffer agreed to pay to Mrs. Renshaw. The mortgage notes were endorsed to John Gundlach, and P. H. Sauter has some interest therein. Sauter and Gundlach filed their bill to foreclose the mortgage and a decree of foreclosure was rendered but the court found that Beasley & Zulley had paid the rent for the full term of their lease to Kauffer and that they were entitled to the possession of the second floor of the building until January 1, 1928, without the payment of any further rent.

Kacalieff sued out of a writ of error and cross errors have been assigned by Gundlach and Beasley & Zulley. It will be observed that Beasley & Zulley procured their lease from Kauffer, who was a vendee in possession of the premises, and that they were in possession of the second floor of the building under that lease at the time the mortgage was executed. The general proposition does not admit of controversy upon the authorities, that from the making of an absolute contract of sale, the land is regarded, in equity, as the property of the vendee, who may dispose of it or encumber it in like manner with land to which he has the legal title, subject to the rights of the vendor under the contract, *Lumbard* v. *Chicago Sinai Congregation,* 64 Ill., 477-482. Where there is a contract for the conveyance of land and the purchaser is let into possession, he is, in equity, the owner of the land, subject only to the lien of the seller for the unpaid purchase money, and has a right to the free use and enjoyment of the rents, issues and profits so long as he is not in default under the contract, *Baldwin* v *Pool,* 74 Ill., 97.

While it is a fair inference that Kauffer did not pay the purchase price within the time mentioned in the contract, yet there is no showing that it was because of any fault on his part. So far as the record shows the delay in closing the deal may have been the fault of Mrs. Renshaw. At any rate it would seem that the delay was with the consent of both parties to the contract and that it cannot be said that Kauffer was in default. Kauffer, with the consent of Mrs. Renshaw, procured Kacalieff to carry out the contract and the deed was made to him. When the mortgage was executed Beasley & Zulley were in possession. Actual occupancy of the premises is equal to recorded instruments under which the occupant claims in charging notice of the occupant's rights and claims, and a purchaser or mortgagee is bound to inquire by what right or title the occupant holds and takes subject to that right or title, *Moore* v. *Machinery Sales Co.,* 297 Ill., 564. The execution of a deed to leased land operates, in law, to convey rents accruing thereafter, but does not give the grantee the right, as against the lessee, to any portion of rent paid in advance. *Nelson* v. *Joshel,* 305 Ill., 420. The same rule applies to the mortgagee who takes a mortgage after a purchaser has entered into possession under a prior lease and is in possession at the time the mortgage was executed.

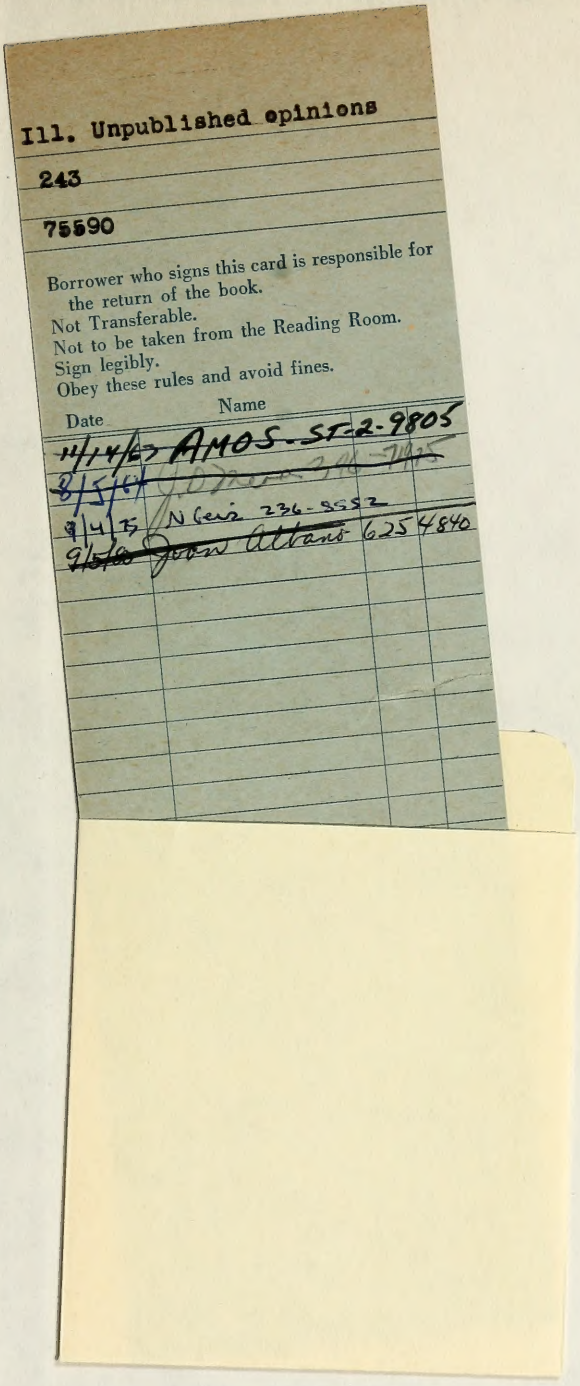
If Kauffer had completed the purchase himself and had procured a deed from Mrs. Renshaw and had executed the mortgage in question, no one would seriously contend that Beasley & Zulley would not be entitled to possession under their lease for the full term thereof and without the payment of any more rent if they had paid the rent in advance. The mere fact that Kauffer procured Kacalieff to complete the

purchase and take a deed direct from Mrs. Renshaw instead of having her make a deed to him and he to execute a deed to Kacalieff, does not put Kacalieff or the mortgagees in any better position. The undisputed evidence is to the effect that Beasley & Zulley had paid the full amount of the rent for the full term of the lease, to Kauffer, before Kacalieff received a deed from Mrs. Renshaw.

We are of the opinion that the decree is in accordance with the law and the evidence and should be affirmed. In the view we take of the case it is unnecessary to pass upon other questions raised by the several parties. As the rights of Beasley & Zulley were fully protected by the decree they are not interested in the question as to whether such a showing was made as entitled the mortgagees to a decree of foreclosure, and no other person is raising that point. The decree is affirmed.

Affirmed.

Not to be reported in full



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